87-205

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALASKA MINERS ASSOCIATION, Petitioner,

v.

TRUSTEES FOR ALASKA, et. al., Respondents,

and

STATE OF ALASKA, et. al., Resondents,

and

FAIRBANKS NORTH STAR BOROUGH, JOSEPH VOGLER, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ALASKA SUPREME COURT

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July 29, 1987

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QUESTIONS PRESENTED

1. When there is no evidence of Congressional intent to authorize private enforcement of a federal statute in federal or state court, and the same federal statute expressly authorizes the U.S. Attorney General to bring an enforcement action in federal district court, may a state court nonetheless entertain a private action based upon the federal statute?

2. Does an Alaska state court have concurrent jurisdiction with federal district court to adjudicate claims alleging violation of Section 6(i) of the Alaska Statehood Act when Section 6(i) provides for enforcement "by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska"?

3. Is the mineral rights scheme established under Alaska Statute 38.05.185, *et. seq.*, under which tens of thousands of individual mining rights have been obtained on state lands by private parties since 1959, invalid under Section 6(i) of the Alaska Statehood Act?

LIST OF PARTIES

The Petitioner is the Alaska Miners Association, a non-profit public interest organization having more than 1,800 members throughout the State of Alaska. One of the Alaska Miners Association's principal purposes is to work for the improvement of the administration of state and federal mining laws as they affect the Alaska mining industry.

Respondents, Trustees for Alaska, Nunam Kitlutsisti, Dinyea Corporation, Village of Minto, Alaska Independent Fishermen's Marketing Association, Alaska Center for the Environment, Southeast Alaska Conservation Council, and Friends of the Earth were plaintiffs in the Superior Court for the State of Alaska and appellants in the Alaska Supreme Court proceeding from which this petition is taken.

Respondents, State of Alaska, Fairbanks North Star Borough and Joseph E. Vogler were defendants (the latter two parties by intervention) in the Alaska state court proceedings. With the Alaska Miners Association, they were appellees in the Alaska Supreme Court. The State of Alaska has filed, or will file, a petition for certiorari in this Court seeking review of the same decision to which this petition is addressed.

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ALASKA MINERS ASSOCIATION, Petitioner,

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FAIRBANKS NORTH STAR BOROUGH,
JOSEPH VOGLER, Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

Petitioner, the Alaska Miners Association, hereby petitions the United States Supreme Court to grant a writ of certiorari to review the decision of the Alaska Supreme Court issued May 1, 1987, in the case of *Trustees for Alaska, et al. v. State of Alaska, et al.*, ____ P.2d ____, Opinion No. 3175)(Alaska, May 1, 1987)(Appendix A). Counsel is advised that the State of Alaska is also filing a petition seeking a writ of certiorari for review of this decision.

OPINIONS BELOW

The Alaska Supreme Court's opinion has not yet been published in the Pacific Reporter. The Slip Opinion is reproduced in Appendix A. The Memorandum Decision and Order Regarding Motions for Summary Judgment has not been reported and is reprinted in Appendix B.

JURISDICTION

The judgment of the Alaska Supreme Court was entered May 1, 1987. This petition was filed within ninety days of the Alaska Supreme Court's May 1, 1987 decision. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).[1]

STATUTE INVOLVED

Section 6(i) of the Alaska Statehood Act, 72 Stat. 339 (1958)

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1. Alaska's highest court, the Alaska Supreme Court, rendered a final decision that a private action may be brought in state court to enforce Section 6(i) of the Alaska Statehood Act and that, on the merits, Alaska's mineral development statutes violate Section 6(i) of the Alaska Statehood Act. In its decision, the Alaska Supreme Court reversed the judgment of the superior court and remanded the matter to the superior court for entry of judgment in accordance with its decision and "for other proceedings as may be appropriate." See Appendix A at 32.

As was recognized by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), at least four categories of cases exist in which state court decisions on federal issues have been treated as final judgments for purposes of jurisdiction even though further proceedings are anticipated in state court. This case fits squarely within the second category described in *Cox Broadcasting Corp.*, as those "in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.*, at 480. The trial court's final judgment cannot and will not affect the Alaska Supreme Court's ruling on the federal questions presented here.

(as amended) (set out in a note preceding 48 U.S.C. § 21 (1982)), reads as follows:

> All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: *Provided,* That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

STATEMENT OF THE CASE

This action arises under Section 6(i) of the Alaska Statehood Act, the act under which Alaska became a State in 1959. Section 6 of the Statehood Act is the land grant provision which granted the new state the right to acquire more than 103 million acres of land from the federal government. Subsection (i) of the land grant provision bars the State from alienating title to minerals which it receives under the Alaska Statehood Act. Further, it specifies that enforcement of the restrictions imposed upon the mineral land grant by the terms of Section 6(i) is by a forfeiture proceeding instituted by the U.S. Attorney General in the United States District Court for the District of Alaska. No provision is made in Section 6(i) for private enforcement.

Section 6(i) has three distinct provisions whose meaning and interaction are at issue in this case:

1. The so-called "mineral alienation condition," which is set forth in the second sentence of the subsection. This part of the statute imposes an "express condition" that all grants by the United States to the State of Alaska of "mineral lands" under subsections 6(a) and (b) must contain a reservation of minerals.
2. The "subject to lease" provision appearing in the third sentence of the subsection, wherein it is provided that "mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct."
3. The proviso at the end of the subsection authorizing the U.S. Attorney General to proceed in the United State District Court for the District of Alaska for forfeiture of "lands or minerals hereafter disposed of contrary to the provisions of this section."

Congress used the nearly identical provision found in the School Lands Act of 1927 (43 U.S.C. § 870(b)(1982) as a model for Section 6(i). Thus, judicial interpretation of Section 6(i)'s "mineral lands" provision could have broad significance for all of the public land grant states that received title to federal lands under the School Lands Act of 1927.

In the late 1950s, anticipating the imminent attainment of statehood, the legislature of the Territory of Alaska enacted a comprehensive code for the management of state lands, the Alaska Land Act (Alaska Statute 38.05 (1984)). This Act establishes a detailed system for the acquisition of the right to explore for and develop minerals in state lands. Under this system, a person may initiate rights to mine by entering state lands, discovering valuable minerals and physically locating a mining claim. A.S. 38.05.185 - .275 (1984). This system of acquiring mineral development rights was mandated by Article VIII of the Alaska Constitution, and is modeled after the federal Mining Law of 1872; but with one difference that is essential to the understanding of this case. Under federal mining law, the owner of a federal mining claim, may, upon proof of compliance with applicable laws, obtain fee title to the land by patent from the United States. In contrast, under Alaska state law the lessee of a state mining claim may not "go to patent." Title can never be transferred to the mining claimant; the State must retain title to the land. AS 38.05.125 (1984).

Since statehood, tens of thousands of state mining claims have been acquired, maintained and developed by the mining industry under the system established by the Alaska Legislature. At present,

the Alaska statutes do not require payment of cash rents or royalties to maintain a mineral right. The State instead requires annual labor. A.S. 38.05.195 (1984) and A.S. 38.05.210 (1984). The annual labor may, at the option of the lessee, be credited against the annual rental amount for mining leases. A.S. 38.05.205(b) (1984). If the Legislature should determine that the economics of the local mining industry justify the imposition of a rent or royalty requirement, the Legislature retains the authority to impose such a requirement. Alaska Constitution, Article VIII, § 11.

At issue in this case is whether the above described mineral leasing system meets the requirements of the "mineral alienation condition" and the "subject to lease" provision of Section 6(i). Further, Section 6(i)'s proviso raises the jurisdictional issue of whether there is a private right of action to enforce the requirements of Section 6(i) and whether the state court has concurrent jurisdiction with the federal court to adjudicate such a cause of action.

The provision of Section 6(i) that addresses enforcement of its "mineral alienation condition" gives the United States the exclusive authority to determine whether it is in the public interest to respond in the event of a technical violation. Under the statute, the United States has retained a right of entry in all "mineral lands" acquired by the State of Alaska under subsections (a) and (b) of the Statehood Act land grant provision. This right of entry reserved to the United States may be invoked only at the discretion of the U.S. Attorney General by filing an action in the United States District Court for the District of Alaska.

Though the plaintiffs in this case contend that the state mining law system violated Section 6(i)'s mineral alienation condition, they did not attempt to persuade the U.S. Attorney General to exercise this statutory right of entry. They did not make formal demand upon the United States to enforce the law as they interpreted it; nor did they sue the U.S. Attorney General in federal district court under the mandamus statute. Instead, they selected to proceed by filing an action in state court, seeking declaratory and injunctive relief based upon the claim that the state's mineral leasing system violates Section 6(i) of the Alaska Statehood Act because it does not require the payment of rents or royalties.

The matter was submitted to the Alaska superior court on cross-motions for summary judgment. The superior court rejected the Section 6(i) claims asserted by the plaintiffs and concluded that Section 6(i) "does not create a cause of action for private litigants to seek enforcement of the terms of that provision." Appendix B at 3. On the

merits, the superior court ruled that the state's mineral management scheme complied with Section 6(i)'s restrictions. With respect to whether rents or royalties were required under the terms of Section 6(i), the court held that "the question of the exact *amount of* consideration to be paid for the right to develop hard rock minerals. . . is a policy question for resolution by the legislative rather than the judicial process." Apendix B at 4.

The plaintiffs appealed the superior court's decision to the Alaska Supreme Court. The supreme court reversed the trial court on both the "private cause of action" and the "rents and royalties" issues and remanded the matter to the superior court "with directions to enter a declaration in accordance with this opinion and for such other further proceedings as may be appropriate." Appendix A at 32. The Alaska Miners Association now petitions for a writ for certiorari for review of the Alaska Supreme Court decision.

REASONS FOR GRANTING THE WRIT

The Alaska Miners Association submits that there are three important reasons why the writ should be granted.

I.

A Uniform Federal Rule is Needed by Which State Courts May Determine Whether a Private Action in State Court May be Entertained to Enforce a Federal Statute Where No Private Right of Action has been Authorized by Congress in Federal Court.

In a series of decisions during the last decade, this Court has gradually restricted the principles governing when a federal statute allows private plaintiffs to bring an action in federal court to enforce a federal statute. During the same period, state courts have become increasingly liberal in allowing plaintiffs to bring actions in state court to enforce federal statutes. These developments present a delicate problem of state-federal relations. Parties seeking to act as "private attorneys general" to enforce federal statutes have turned to the state courts for relief in circumstances where Congress has not authorized a private right of action in federal court. State courts have thereby been required to take upon themselves the responsibility of defining

and enforcing federal statutes. As will be seen in the instant case, this state court activity substantially increases the risk of inconsistent adjudications and threatens the primacy of the federal agencies in the implementation and oversight of federal statutes.

The Alaska state court decision in this litigation is a paradigm of this problem of federalism. Section 6(i) of the Alaska Statehood Act imposes a limitation upon the State of Alaska's power to dispose of mineral rights in certain of the lands it obtains under its Statehood Act land grant. The nature and scope of those limitations is a matter of disagreement between the parties in this case. Section 6(i) reserves to the United States of America from the grant of these lands a right of entry to recover title to any lands with respect to which the State violates the limitations of Section 6(i). It provides that, upon a violation, the Attorney General may bring an action in the United States District Court for the District of Alaska.

The plaintiffs in this action believe that the State of Alaska's mining laws violate Section 6(i). They did not attempt to persuade the United States Attorney General to exercise his enforcement authority under the statute. They did not file an action in the United States District Court for enforcement of the statute; indeed, they acknowledged that a private right of action for enforcement of the statute in federal court was probably unavailable. Instead, they filed an action in the Alaska superior court seeking a declaratory judgment that the state mining law system violates Section 6(i).

The Alaska Miners Association and the other defendants in the case took the position that Section 6(i) commits enforcement of its provisions to the Attorney General for the United States, an authority to be exercised in his discretion through the vehicle of an action in the federal district court. The Alaska superior court agreed that only the U.S. Attorney General has the authority to sue for enforcement, and denied the plaintiffs' claims. Appendix B at page 5. The Alaska Supreme Court disagreed, holding that the plaintiffs could sue to enforce Section 6(i) in a state court action notwithstanding the provision committing that enforcement decision to the U.S. Attorney General.

In 1975, this Court modified its approach to determining when a private right of action will be inferred from a federal statute by adopting a four factor test. *Cort v. Ash*, 422 U.S. 66, 78, (1975). This test was subsequently refined in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) to emphasize that no private cause of action will be implied absent a firm showing a congressional intent to allow it. *See also, Merrell Dow Pharmaceuticals, Inc. v. Thompson*, ____U.S.____, 106 S. Ct. 3229 (1986). As the Court noted in *Merrell*, "the development of our

framework for determining whether a private cause of action exists, [to enforce a federal statute in federal court] has proceeded only in the last 11 years." *Id.* at ____, 106 S.Ct. at 3234. The product of these cases is a relatively stable rule of law which governs the question of when a private federal cause of action may be implied. In general, that rule states that the matter is to be determined by reference to congressional intent, with a strong presumption against the private right of action.[2]

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2. Case law underscores this strong presumption against the private right of action in cases where Congress specifically commits to the Attorney General "prosecutorial discretion". Prosecutorial discretion provisions preclude suits by others to establish a violation or to exact a penalty. *See, e.g., National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453 (1974); *People for Environmental Progress v. Leisz,* 373 F. Supp. 589 (C.D.Cal. 1974). In *Railway Labor Executive Association v. Dole,* 760 F.2d 1021 (9th Cir. 1985), the Ninth Circuit applied the principle that

> [o]rdinarily, when Congress designates the United States Attorney of the district in which the violation is detected as the officer to prosecute the penalty provision, that designation is exclusive, and private attorneys have no standing to bring private actions to force the prosecutor to act.

Id., at 1024.

In a related context, this Court recently emphasized the principle that private litigants are not entitled to arrogate unto themselves the federal government's exclusive enforcement prerogatives by means of private actions. In *Heckler v. Chaney,* 470 U.S. 821, 831 (1985) this Court explained the underlying rationale as follows:

> The reasons for this general unsuitability [of judicial review of agency decisions to refuse enforcement] are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the

(Footnote Cont.)

Contrasted against this stable rule of law against implying private right of actions in federal court is the lack of any principles for determining when state courts may entertain actions to enforce federal statutes. In the case at bar, the Alaska Supreme Court ruled that the plaintiffs could proceed with their action to enforce Section 6(i) in the state court system, notwithstanding the likely absence of any private right of action in the federal courts, because they found no "indication that Congress intended to bar our state courts from interpreting Section 6(i)." Appendix A at 12. The court in effect reversed the presumption applied in federal courts, allowing the private enforcement action to proceed in state court so long as there was no affirmative evidence of a Congressional intent to preclude it.

This case presents an exceptional opportunity for this Court to address the recent trend toward enforcement of federal statutes by "private attorneys general" through state court actions. The Alaska Supreme Court took pains to note that its decision in this case was grounded exclusively upon the federal statutory basis, rejecting all possibilities of an alternative state ground for decision. The practical implications of this decision to allow a state court private right of action for the enforcement of Section 6(i) are particularly offensive to traditional concepts of federalism. In litigation to which the United States of American was not (and probably could not become) a party,[3] the Alaska Supreme Court has defined an interest in real property retained by the United States of America pursuant to the federal Alaska Statehood Act. For this reason, the petition for certiorari should be granted.

(Footnote Cont.)

> statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

This rule against implying a private right of action in the face of specific congressional grant of prosecutorial discretion has been applied specifically with respect to public land grants made subject to conditions enforceable by the exercise of powers reserved in the sovereign grantor. *See, e.g., Downer v. Graham,* 21 F.2d 732 (10th Cir. 1927) (suit upon alleged violation of a condition upon the disposition of New Mexico statehood lands may only be maintained by U.S. Attorney General).

3. The United States is not a party to this case. In the only other case dealing with Section 6(i) of the Alaska Statehood Act *(State v. Lewis,* 559 P.2d 630 (Alaska) *cert. denied,* 432 U.S. 901 (1977)), the United States attempted to participate in the Alaska Supreme Court proceedings by means of a motion for leave to file an *amicus curiae* brief, but the Alaska Supreme Court denied the motion.

II.

A Uniform Federal Rule is Needed to Determine When Concurrent State Court Jurisdiction for the Enforcement of a Federal Statute is Incompatible with Federal Interests Such that the Matter Should Be Left to the Exclusive Jurisdiction of the Federal Courts.

In a series of decisions this Court has established a presumption that state courts have concurrent jurisdiction to adjudicate actions for the enforcement of federal statutes, rebuttable only upon evidence of Congressional intent to the contrary. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962); *Claflin v. Houseman*, 93 U.S. 130 (1876). This presumption can be rebutted by an explicit statutory directive, by unmistakable implication from the legislative history, or by a clear incompatibility between state court jurisdiction and federal interests. *Gulf Offshore*, 453 U.S. at 478. This last alternative, the "clear incompatibility between state-court jurisdiction and federal interests," is the source of the confusion with respect to Section 6(i).

This Court has described the *Gulf Offshore* test as "straight forward" and has identified some of the considerations to be weighed in determining whether state court concurrent jurisdiction is incompatible with federal interests. *Id.*, at 478.

> The factors generally recommending exclusive federal-jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.

Id. at 483-84.

Nonetheless, experience in state court and lower federal courts suggest that clarification of the clear incompatibility between state court jurisdiction and federal interest analysis is needed. This is especially true in RICO (Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1964 (1982)), Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000, *et seq.* (1982)) and ERISA (Employment

Retirement Income Security Act of 1974, 29 U.S.C. § 1000, *et seq.* (1982)) cases.[4] Even though many recent opinions have undertaken a thorough *Gulf Offshore* analysis, they reach diametrically opposing conclusions about whether exclusive federal jurisdiction is implied. *See, eg., Simpson Electric v. Leucadia, Inc.,* 515 N.Y.S. 2d 794 (N.Y.A.D., 2 Dept. 1987) and *Karel v. Kroher,* 635 F. Supp. 725 (N.D. Ill. 1986).

The difficulty faced by state and federal courts in determining whether concurrent state court jurisdiction is "incompatible with federal interests" is evident in the Alaska Supreme Court's decision in this case. Although Section 6(i) explicitly authorizes the U.S. Attorney to bring an enforcement action in federal district court, the state court determined that it had concurrent jurisdiction. It did so in the face of the obvious political tension that would be created by a state court interpretation of a land forfeiture provision in a federal enabling act.

The Alaska state court's decision to assume concurrent jurisdiction to decide the case on the merits places the federal district court in future actions in the compromising position of having little choice but to tailor its interpretation of Section 6(i) to the prior state court interpretation. By not having a specific test enabling lower courts to determine when Congress has implied exclusive federal jurisdiction, the freedom of the federal courts to interpret federal statutes is curtailed and the risk of inconsistent standards and remedies is greatly increased.

This case thus provides an opportunity for addressing whether, when a statute explicitly provides for a federal enforcement mechanism in district court, a state court can determine that it has concurrent jurisdiction to entertain an action addressing a federal statute.

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4. *Cf., e.g., Simpson Electric Corp. v. Leucadia, Inc.,* 515 N.Y.S. 2d 794 (N.Y. A.D., 2 Dept. 1987); *Spence v. Flynt,* 647 F. Supp. 1266 (D. Wyo. 1986) (holding that federal courts have exclusive jurisdiction over RICO actions) with *HMK Corp. v. Walsey,* 637 F. Supp. 710 (E.D. Va. 1986); *Cianci v. Superior Court (Popingo),* 40 Cal. 3d 903, 221 Cal. Rptr. 575, 710 P. 2d 375 (1985) (holding that state courts have concurrent jurisdiction over RICO actions). *See also, Peick v. Murray,* 141 Ill. App. 3d 1081, 96 Ill. Dec. 286, 491 N.E. 2d 100, (Ill. 1 Dist. 1986) (appeal denied) (holding that state court does not have jurisdiction over action to enforce welfare trust and benefit plan under ERISA); *Retired Public Employees' Association of California v. Board of Administration for the Public Employees Retirement Systems,* 229 Cal. Rptr. 69, 184 Cal. App. 3d 328 (1986) (Title VII of the Civil Rights Act of 1964, 42 USC § 2000 *et seq.* (1982), remedies for redress of sex based discrimination and privileges of employment are exclusive federal remedies).

III.

Because the Alaska Supreme Court's Interpretation of Section 6(i) of the Alaska Statehood Act has Such a Substantial Effect on Alaska's Management of its Mineral Wealth as Well as on Other Courts' Interpretations of Similar Provisions in the School Lands Act and Other Statehood Acts, Review of the Alaska Supreme Court's Opinion is Warranted.

Section 6(i) is an example of the delicate balance of federal and state interests embodied in statehood acts. This Court has shown a special, institutional concern about supervising state court interpretation and implementation of statehood acts. Provisions similar to Section 6(i) appear in other states' enabling acts as well as the School Lands Act, suggesting that the impact of the Alaska Supreme Court's decision may spread beyond its own borders. *See e.g.* The Hawaii Admission Act, Section 5(f), an act to provide for the admission of the state of Hawaii into the Union, Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4. The tension between federal and state interests created by the Alaska Supreme Court's interpretation of Section 6(i) exists both for Alaska and for other states.

If the Alaska Supreme Court opinion is allowed to stand, it will limit the interpretation available to the district court of Section 6(i) as well as the ability of the U.S. Attorney General to determine when to enforce Section 6(i). In any future Section 6(i) action in federal district court, the Alaska Supreme Court's opinion will place the district court in the position of having to interpret Section 6(i) in the same manner as the Alaska Supreme Court or render a conflicting decision which will subject the State of Alaska to inconsistent standards for managing its mineral resources. Further, the prerogative specifically assigned to the U.S. Attorney General to determine when Section 6(i) has been violated and when to initiate enforcement proceedings under the Alaska Statehood Act is limited by the fact that the Alaska Supreme Court has already found the State of Alaska's current mineral rights system to be in violation of Section 6(i). These same restrictions will limit other courts in interpreting provisions similar to Section 6(i). For this reason this Court should grant review of the Alaska Supreme Court opinion.

A further reason to grant review is the substantial effect that the decision has on title to Alaska State mineral lands. The Alaska Supreme Court's ruling seriously undermines established property interests in all state mineral lands. It raises the spectre of an action seeking forfeiture of state mineral lands to the United States and forces the Alaska State Legislature to redraft the entire body of legislation governing its mineral rights system.

In a state whose economy is based on mineral wealth, a cloud on title to all state mineral rights and the redrafting of the entire state mineral rights system will have major economic and political effect. All past, current and future disposition of mineral wealth in the State of Alaska is directly or indirectly affected. The effect of the Alaska Supreme Court opinion is thus not academic nor episodic, *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 74 (1955); it does not pertain simply to the particular parties involved. Rather, it is of public importance. Because of the substantial impact which the decision will have in Alaska, this Court should grant certiorari. *See Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961) (certiorari granted to review "because of the importance of the ruling to the new State of Alaska"); *Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959) (certiorari granted "in view of the fiscal importance of the question to Alaska").

CONCLUSION

The Court should issue a writ of certiorari (1) to establish a uniform federal rule by which state courts may determine when a private action in state court may be entertained to enforce a federal statute, where no private right of action has been authorized by Congress in federal court, (2) to establish a rule to aid state courts in determining when concurrent state court jurisdiction for the enforcement of a federal statute is incompatible with federal interests such that the exclusive jurisdiction of the federal courts should be implied, and (3) to review the Alaska Supreme Court's interpretation of Section 6(i) of the Alaska Statehood Act.

NOTICE: This opinion is subject to formal correction before publication in the *Pacific Reporter.* Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

TRUSTEES FOR ALASKA, NUNAM KITLUTSISTI, DINYEA CORPORATION, VILLAGE OF MINTO, ALASKA INDEPENDENT FISHERMEN'S MARKETING ASSOCIATION, ALASKA CENTER THE ENVIRONMENT, SOUTHEAST ALASKA CONSERVATION COUNCIL, FRIENDS OF THE EARTH,	)	
Plaintiffs/Appellants,	)	File No. S-1142
v.	)	
STATE OF ALASKA, ALASKA DEPARTMENT OF NATURAL RESOURCES, ESTHER WUNNICKE, Commissioner, Department of Natural Resources,	)	O P I N I O N
Defendants/Appellees,	)	
ALASKA MINERS ASSOCIATION, FAIRBANKS NORTH STAR BOROUGH and JOSEPH E. VOGLER,	)	[No. 3175-May 1, 1987]
Defendants-Intervenors/Appellees.	)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Douglas Serdahely, Judge.

Appearances: Eric Smith and Robert W. Adler, Anchorage, for the Appellants. Robert M. Maynard and Mark P.

Worcester, Assistant Attorneys General, Anchorage, Harold M. Brown, Attorney General, Juneau, for Appellee State of Alaska, Alaska Department of Natural Resources, and Esther Wunnicke, Commissioner, Department of Natural Resources. James N. Reeves, Bogle & Gates, Anchorage, for Appellee Alaska Miners Association. Ronald A. Zumbrun, Robin L. Rivett, and James S. Burling, Pacific Legal Foundation, Sacramento, California, and Michael B. Markham, Borough Attorney, Fairbanks, for Appellee Fairbanks North Star Borough. Thomas R. Wickwire, Fairbanks, for Appellee Joseph E. Vogler.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices.

MATTHEWS, Justice.

Alaska was granted the right to select 103,350,000 acres of land from the United States under section 6(a) and (b)of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) (set out in a note preceding 48 U.S.C. § 21 (1982)). Mineral deposits in selected lands were also conveyed, subject to certain restrictions. Section 6(i) of the Act provides:

> All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the

> same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: *Provided,* That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

This case presents issues concerning the meaning of the section 6(i) grant and restrictions, and of appellants' standing to bring an action in state court to construe the meaning of the Alaska Statehood Act.

I. PROCEEDINGS BELOW

The appellants are a coalition of environmental, Native, and fishing groups. They filed an action in superior court seeking a declaration that the state's mineral leasing system violates section 6(i) in that the state does not require payment of either rent or royalties in leases of lands subject to section 6(i), and that the state has incorrectly construed the section 6(i) restrictions to apply only to lands known to contain minerals at the time of state selection rather than to all selected lands which contain minerals.[1]

All parties moved for summary judgment. The trial court ruled that the appellants did not have standing, that section 6(i) is enforceable only by the Attorney General of the United States, and that the state's mineral management system does not violate section 6(i). The court did not rule on the question whether the section 6(i) restrictions apply to all state-selected lands containing minerals or merely to those known to contain minerals at the time of selections.

We conclude that appellants have standing to maintain this declaratory judgment action, that the state's mineral leasing system violates section 6(i) because it does not require the payment of rent or royalties on mining leases, and that section 6(i) applies only to those lands known to have been mineral in character at the time of state selection.

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1. Appellants also contend that section 6(i) has become part of the Constitution of Alaska, and has created public trust duties. Thus, appellants argue, to the extent that section 6(i) has been violated, so has the Alaska Constitution and the public trust.

II. STANDING TO MAINTAIN DECLARATORY JUDGMENT ACTION

A. Standing

"Standing questions are limited to whether the litigant is a 'proper party to request an adjudication of a particular issue . . . .'" *Moore v. State,* 553 P.2d 8, 24 n.25 (Alaska 1976) (quoting *Flast v. Cohen,* 392 U.S. 83, 100-01, 20 L. Ed. 2d 947, 961 (1968)). Standing in our state courts is not a constitutional doctrine; rather, it is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions. *Id.* The basic requirement for standing in Alaska is adversity. *Id.*

The concept of standing has been interpreted broadly in Alaska. We have "departed from a restrictive interpretation of the standing requirement," *Coghill v. Boucher,* 511 P.2d 1297, 1303 (Alaska 1973), adopting instead an approach "favoring increased accessibility to judicial forums." *Moore v. State,* 553 P.2d at 23; *see also State v. Lewis,* 559 P.2d 630, 634 n.7 (Alaska) (and cases cited therein), *cert. denied,* 432 U.S. 901, 53 L. Ed. 2d 1073 (1977). Our cases have discussed two different kinds of standing. One is interest-injury standing; the other is citizen-taxpayer standing.

Under the interest-injury approach, a plaintiff must have an interest adversely affected by the conduct complained of. Such an interest may be economic, *Moore,* 553 P.2d at 24; *Wagstaff v. Superior Court, Family Division,* 535 P.2d 1220, 1225 (Alaska 1975), or it may be intangible, such as an aesthetic or environmental interest. *Lewis,* 559 P.2d at 635. The degree of injury to the interest need not be great; "'[t]he basic idea . . . is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.'" *Wagstaff,* 535 P.2d at 1225 & n.7 (quoting Davis, *Standing: Taxpayers and Others,* 35 U. Chi. L. Rev. 601, 613 (1968)).

In the instant case, the appellants assert that they have standing as citizens or taxpayers, rather than because their interests are injured. In prior cases, we have often permitted taxpayers or citizens to challenge governmental action based on their status as taxpayers or citizens. In many such cases, standing has been assumed and not discussed.[2] We have, however, explicitly addressed taxpayer-citizen

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2. *E.g., Thomas v. Bailey,* 595 P.2d 1 (Alaska 1979) (land grant initiative challenged by citizens and taxpayers); *Abrams v. State,* 534 P.2d 91 (Alaska 1975)

(Footnote Cont.)

standing on other occasions. For example, in *Coghill v. Boucher,* 511 P.2d 1297 (Alaska 1973), registered voters (one of whom was also a poll watcher) were allowed to challenge certain proposed vote-counting procedures. In finding standing, we stated:

> In the case at bar, we conclude that a retreat to restrictive notions of standing, as urged by appellee, would not advance the public's vital interest in maintenance of the integrity of vote-tallying procedures during statewide elections. Denial of standing to appellants in the instant case would have the effect of unduly limiting the possibility of a popular check upon executive control of the election process. If registered voters and poll watchers are foreclosed from seeking judicial review of administrative regulation of this sensitive aspect of our governmental system, then it may well be that any review of executive activity in this area would be completely foreclosed, particularly in the event that candidates or political parties were unwilling to challenge such administrative actions. We decline to restrict the public's access to Alaska's courts in such a manner.

(taxpayer and citizen suit challenging legislative formation of Eagle River-Chugiak Borough); *Boucher v. Engstrom,* 528 P.2d 456 (Alaska 1974) (citizen suit to enjoin placement of capital move initiative on ballot); *Boucher v. Bomhoff,* 495 P.2d 77 (Alaska 1972) (citizen challenge to the wording of a referendum question); *Jefferson v. Asplund,* 458 P.2d 995 (Alaska 1969) (taxpayer suit challenging public professional service contract); *Jefferson v. Greater Anchorage Area Borough,* 451 P.2d 730 (Alaska 1969) (taxpayer suit challenging a bond issue); *Suber v. Alaska State Bond Committee,* 414 P.2d 546 (Alaska 1966) (taxpayer suit challenging public mortgage adjustment program); *Walters v. Cease,* 394 P.2d 670 (Alaska 1964) (citizen suit to enjoin referendum relating to formation of local government units); *DeArmond v. Alaska State Development Corporation,* 376 P.2d 717 (Alaska 1962) (taxpayer suit challenging the legality of public corporation); *Starr v. Hagglund,* 374 P.2d 316 (Alaska 1962) (citizen suit to enjoin capital move initiative).

Some of these cases were subsequently recognized as taxpayer standing suits. *See K & L Distributors, Inc. v. Murkowski,* 486 P.2d 351, 353 n.1 (Alaska 1971) (characterizing *Jefferson v. Asplund,* 458 P.2d 995, and *Greater Anchorage Area Borough v. Porter and Jefferson,* 469 P.2d 360 (Alaska 1970), as taxpayer standing actions); *Moore* 553 P.2d at 24 n.26 (citing *Jefferson v. Greater Anchorage Area Borough,* 451 P.2d 730, as an example of taxpayer standing).

Id. at 1304.

We also discussed the question of taxpayer standing in *Lewis,* 559 P.2d 630. At issue was the legality of a three-way land trade between the state, the federal government, and a native regional corporation. Our characterization of the plaintiffs' interest in Lewis applies in this case. "Here, plaintiffs are seeking to protect mineral resources in land originally selected from the federal government under the Statehood Act. Their interest in the state's retention of mineral rights in state lands is no less significant than the aesthetic and environmental values sought to be vindicated in *Sierra Club [v. Morton,* 405 U.S. 727, 31 L. Ed. 2d 636 (1972)] and *[United States v.] SCRAP* [,412 U.S. 669, 37 L. Ed. 2d 254 (1973)]." 559 P.2d at 635. We declined to decide whether standing should be allowed in all taxpayer or citizen actions, but we allowed taxpayer standing in *Lewis.* Several factors influenced our conclusion: the land transfer allegedly violated specific constitutional limitations, the transfer was significant in size and in its potential economic impact on the state, and no one seemed to be in a better position than the plaintiffs to complain of the illegality of the transaction. *Id.*

In *Carpenter v. Hammond,* 667 P.2d 1204 (Alaska), *appeal dismissed,* 464 U.S. 801, 78 L. Ed. 2d 67 (1983), we affirmed, in an alternative holding, the standing of a citizen to challenge the reapportionment of a House District in which she did not reside or vote. We stated:

> In the instant case, Carpenter alleges that District 2 violates a specific constitutional limitation and that the disputed transaction (the drawing of election district lines) arguably will have a significant impact on the state. Here the dispute over District 2 has been fully briefed, argued at trial and on appeal, and there is no one in a better position than Carpenter to litigate these issues. In our view, Carpenter also meets the standing criteria of *Lewis.*

Id. at 1210 (footnote omitted).

Gilman v. Martin, 662 P.2d 120 (Alaska 1983), involved a challenge to a municipal sale of land. We upheld taxpayer standing, stating that "[a]ny resident or taxpayer of a municipality has a suf-

ficient interest in the disposition of a significant number of acres of the municipality's land to seek a declaratory judgment as to the validity of the disposition." *Id.* at 123.

In *Hoblit v. Commissioner of Natural Resources,* 678 P.2d 1337 (Alaska 1984), we held that plaintiff did not have standing as a taxpayer to challenge the sale of some twenty acres of state land. We distinguished *Gilman* on the grounds that the amount of acreage involved in *Hoblit* was not "significant." 678 P.2d at 1341. Similarly, we distinguished *Lewis* because the " 'magnitude of the transaction and its potential economic impact on the State' which were determinative in *Lewis* are simply lacking here." *Id.* We remanded for a determination as to whether or not the plaintiff had standing because of his status as an adjoining land owner. *Id.* at 1341-42.

This review of taxpayer-citizen standing in Alaska clearly demonstrates that taxpayer-citizen status is a sufficient basis on which to challenge allegedly illegal government conduct on matters of significant public concern. Taxpayer-citizen standing has never been denied in any decision of this court, except on the basis that the controversy was not of public significance,[3] or on the basis that the plaintiff was not a taxpayer.[4] However, *Lewis* and *Carpenter* suggested, without deciding, that taxpayer citizen standing may be denied even in cases of public significance under certain circumstances.[5]

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3. *Hoblit,* 678 P.2d 1337.

4. *Greater Anchorage Area Borough v. Porter & Jefferson,* 469 P.2d 360.

5. The Utah Supreme Court relied in part on *Lewis* and adopted a discretionary denial approach *in Jenkins v. Swan,* 675 P.2d 1145, 1150-51 (Utah 1983):

> If the plaintiff does not have standing under the first step [that is, interest-injury standing], we will then address the question of whether there is anyone who has a greater interest in the outcome of the case than the plaintiff. If there is no one, and if the issue is unlikely to be raised at all if the plaintiff is denied standing, this Court will grant standing. *See, e.g., State v. Lewis,* Alaska, 559 P.2d 630,635 (1977). When standing is predicated on the assertion that the issues involve "great public interest and societal impact," we will retain our practical concern that the parties involved have the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions.

(Footnote Cont.)

In our view, taxpayer-citizen standing cannot be claimed in all cases as a matter of right. Rather, each case must be examined to determine if several criteria have been met. First, the case in question must be one of public significance.[6] One measure of significance may be that specific constitutional limitations are at issue, as in *Carpenter and Lewis.* That is not an exclusive measure of significance, however, as statutory and common law questions may also be very important.[7] Second, the plaintiff must be appropriate in several respects. For example, standing may be denied if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit. The same is true if there is no true adversity of interest, such as a sham plaintiff whose intent is to lose the lawsuit and thus create judicial precedent upholding the challenged action.[8] Further, standing may be denied if the plaintiff appears to be incapable, for

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(Footnote Cont.)

> The Court will deny standing when a plaintiff does not satisfy the first requirement of the analysis and there are potential plaintiffs with a more direct interest in the issues who can more adequately litigate the issues.
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> The third step in the analysis is to decide if the issues raised by the plaintiff are of sufficient public importance in and of themselves to grant him standing. The absence of a more appropriate plaintiff will not automatically justify granting standing to a particular plaintiff. This Court must still determine, on a case-by-case basis, that the issues are of sufficient weight, *see Jenkins v. Finlinson,* Utah, 607 P.2d 289 (1980), and that they are not more properly addressed by the other branches of government. Constitutional and practical considerations will necessarily affect our decisions in cases where a plaintiff who lacks standing under step one nevertheless raises important public issues. These are matters to be more fully developed in the context of future cases.

6. *See, e.g., Carpenter,* 667 P.2d at 1210; *Gilman,* 662 P.2d at 123; *Lewis,* 559 P.2d at 635.

7. *See, e.g., Coghill v. Boucher,* 511 P.2d 1297 (taxpayer's challenge of lieutenant governor's promulgation of regulations under elections statute).

8. *See Flast v. Cohen,* 392 U.S. 83, 100, 20 L.Ed. 2d 947, 962 (1968) ("federal courts will not entertain friendly suits...or those which are feigned or collusive").

economic or other reasons, of competently advocating the position it has asserted.[9]

The instant case is undoubtedly one of public significance. If appellants prevail, the state must change its method of making state land available for mining. Some 50,000 existing mining claims may be affected. Under the current system, according to the appellants, the state is illegally giving up more than $100,000 annually in royalties. Further, the state is at risk of forfeiting to the United States extensive areas of state lands. The state has correctly acknowledged the significance of this case.

We turn now to consider whether appellants are appropriate parties to bring this suit. They are well represented by competent counsel who have forcefully presented their position. They are not sham plaintiffs; their sincerity in opposing the state's mineral disposition system is unquestioned. On the other hand, the state argues that there is a potential plaintiff with a more direct interest in the validity of the state's system. The state contends that the Attorney General of the United States may bring a forfeiture proceeding under section 6(i) and that this possibility means that appellants lack standing.

In our view, the mere possibility that the Attorney General may sue does not mean that appellants are inappropriate plaintiffs. In *Carpenter,* a resident and voter of the House District in question would theoretically have been more interested in litigating the question whether the district was malapportioned than was the non-resident plaintiff in that case. However, no such person had filed suit. We noted that the issues had been fully presented at trial and on appeal by the plaintiff, and held that she had standing. 667 P.2d at 1210. Similarly, in *Coghill v. Boucher,* we suggested that candidates or political parties might be more interested than registered voters and poll watchers in challenging the vote-counting procedures at issue. However, they had not done so. We noted that if the plaintiffs were

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9. One reason for the adversity requirement is to insure that the issues are well presented. As the Utah Supreme Court said, "When standing is predicated on the assertion that the issues involve 'great public interest and societal impact,' we will retain our practical concern that the parties involved have the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions." *Jenkins,* 675 P.2d at 1150-51.

In the analogous context of class action suits, one important criterion of a party's ability to effectively represent the class is its capacity, for economic and other reasons, to competently advocate its position. *See* 3 B.J. Moore and J. Kennedy, *Moore's Federal Practice* § 23.07[1.-1], at 23-215 (1985) (under Fed. R. Civ. P. 23(a)(4), "it has become routine to inquire into the competence, experience and vigor of the representative's counsel").

not afforded standing, "it may well be that any review of executive activity in this area would be completely foreclosed." 511 P.2d at 1034. Thus, the crucial inquiry is whether the more directly concerned potential plaintiff has sued or seems likely to sue in the foreseeable future. The Attorney General has not sued nor are there any indications that he plans to do so.

Moreover, the appellants' interest in this suit is different than the Attorney General's would be if suit were brought in the United States District Court pursuant to section 6(i). Appellants are interested in preserving to the state the economic value of these lands. The Attorney General, however, would be bringing an action for forfeiture of these lands, contrary to appellants' interest.

For these reasons we conclude that appellants have standing as taxpayer-citizens to maintain this action.

B. A Declaratory Judgment Action Interpreting the Provisions of Section 6(i) May be Maintained.

There has been much litigation concerning the meaning and scope of various statehood act land grants and their restrictions.[10] There have been frequent questions of ownership of the granted lands as between private or governmental contestants.[11] Much of this litigation has occurred in the state courts. The question presented in this case is whether Congress intended to preclude all litigation concerning the meaning of section 6(i) by enacting the proviso which reads:

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10. *E.g., Boyce v. Pima County,* 208 P. 419 (Ariz. 1922); *Jensen v. Dinehart,* 645 P.2d 32 (Utah 1982); *cf., State v. University of Alaska,* 624 P.2d 807 (Alaska 1981).

11. *E.g., Rodgers v. Berger,* 103 P.2d 266 (Ariz. 1940) (appeal from suit by private mining claimant against state and other private claimants to quiet title in mining claim on land granted under statehood act; in trial court, state alleged it was owner because land was a school section; state did not appeal trial court's judgment for plaintiff); *Texas Pacific Coal & Oil Co. v. State,* 234 P.2d 452 (Mont. 1951) (corporation's suit against state to quiet leasehold title to oil and gas deposits under certain school land acquired by state under state enabling act); *cf. Lassen v. Arizona,* 385 U.S. 458, 17 L. Ed. 2d 515 (1967) (appeal from Arizona Supreme Court ruling in case between two state executive agencies to compel compensation to trust created under New Mexico-Arizona Enabling Act); *State v. Walker,* 301 P.2d 317 (N. M. 1956) (suit between State Highway Commission and Commissioner of Public Lands concerning rights of way or easements over state trust lands granted under New Mexico Enabling Act); *Ross v. Trustees of University of Wyoming,* 222 P. 3 (Wyo. 1924) (suit between governor and trustees concerning land granted and confirmed by act of admission for university purposes).

> That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

In our view, this question must be answered in the negative. It is clear that Congress intended that only the U.S. Attorney General could bring forfeiture proceedings and that such proceedings could only be brought in the United States District Court for the District of Alaska. No inference can be drawn, however, from either the context or the history of the Statehood Act that forfeiture proceedings were meant to be the only means by which a judicial interpretation of the meaning of section 6(i) could be obtained.

The sole reference to the land grant forfeiture provision which we have found in the legislative history appears in the Senate Report accompanying a 1954 bill providing for the admission of Alaska into the Union, S. 50, 83d Cong., 2d Sess. (1954):

> The Attorney General is authorized to take appropriate proceedings for forfeiture of any of the lands granted to the State which are disposed of contrary to these restrictions. In making the above provision, the committee has followed the practice prevalent in a number of mining States - a practice that has stood the test of time and experience.

S. Rep. No. 1028, 83d Cong., 2d Sess. 32 (1954). This reference is to the forfeiture clause of the Act of January 25, 1927 (commonly called the School Lands Act of 1927) 44 Stat. 1026, codified at 43 U.S.C. § 870(b (1982)), which extended to public land states grants of certain numbered school sections which were mineral in character.[12] This clause has not prevented judicial interpretation of

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12. The proviso in the School Lands Act states:

> That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located. (Footnote Cont.)

the School Lands Act in non-forfeiture proceedings.[13] We hold that the identical language in section 6(i) has a similar, non-preclusive effect. It would be unusual in the extreme if a state court could not construe the meaning of its state's Statehood Act. In the absence of any indication that Congress intended to bar our state courts from interpreting section 6(i), we conclude that appellants' declaratory judgment action seeking an interpretation of section 6(i) may be maintained.

III. THE STATE'S DISPOSITION OF MINERALS VIOLATES SECTION 6(i) OF THE STATEHOOD ACT

Having determined that appellants have standing to bring this declaratory action, we now turn to their arguments on the merits. Their arguments may be summarized as follows. Section 6(i) of the Statehood Act provides that the state must reserve to itself all of the minerals in the mineral lands granted to the state pursuant to section 6(a) and (b) of the Act. Furthermore, section 6(i) provides that "[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct." Appellants argue that because the state does not require the payment of rent or royalties from those miners whom the state permits to locate and extract hardrock minerals, the state violates section 6(i) of the Act. Appellants also argue that the state has violated section 6(i) by defining "mineral lands" subject to the lease requirement to mean those lands known to be of mineral character at the time of state selection, rather than all lands selected which are ultimately discovered to be of mineral character.

The appellants' arguments raise questions concerning the meaning of section 6(i), and of Congress's intent in grantino the state mineral rights on the one hand, but restricting the state in its method of disposing of those minerals on the other. To answer these questions, we look to the plain language of section 6(i), to the legislative history of the Statehood Act, and to cases construing section 6(i). We also look to general principles of mining law to understand the framework within which section 6(i) must be analyzed.

(Footnote Cont.)

> purpose in the United States district court for the district in which the property or some part thereof is located.

43 U.S.C. § 870 (b) (1982). This proviso is discussed in more detail in part IIIB of this opinion, *infra* p. 21.

13. *E.g., Rodgers,* 103 P 2d 266; *Jensen,* 645 P.2d 32.

A. General Principles of Mineral Disposition

When Congress passed the Alaska Statehood Act, there were three methods for disposition of minerals located on federal lands: location, lease, and sale. Only locations and leases are relevant in the instant case.[14]

The location system is the oldest method of mineral disposition. It originated on the public domain as a matter of custom and was institutionalized by various statutes, the most important of which was the Mining Law of 1872.[15] Under the location system, the first claimant who discovers a valuable mineral deposit on unappropriated public domain, stakes and files a mining claim, and pursues it, has a legally protected interest. The locator is entitled to produce minerals from the deposit without paying rent or royalties, and has the right to obtain fee simple title by means of a patent issued by the United States government. 1 American Law of Mining § 30.01, at 30-3 (2d ed. 1985) (all references to American Law of Mining are to the 1985 edition unless otherwise noted).

Mineral leasing is the primary alternative to the location system. The Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-263 (1982), is the most important statute governing mineral leases; in many respects it has become the model for other federal mineral leasing acts. 1 American Law of Mining § 20.01, at 20-6-7. The Mineral Leasing Act was passed to supersede the location system as to the minerals it covers because of Congress's perception that important revenues were being lost under the older system.[16]

Under the Mineral Leasing Act, competitive leases are issued on lands known to contain valuable mineral deposits. 30 U.S.C. §§ 262, 272, 283. Bidders buy competitive leases from the government for a premium established at a public sale. 43 C.F.R. §§ 3521.2-2, 3521.2-4, 3521.2-5 (1985). Where valuable mineral deposits are not known to exist, a prospecting permit may be issued to the first qualified applicant *See* 43 C.F.R. § 3510.0-3. If the permittee discovers a valuable mineral deposit, the permittee may be rewarded with a preference right lease. 43 C.F.R. § 3520.1-1.

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14. The sale method pertains to certain varieties of sand and gravel and other common materials. 30 U.S.C. § 601 (1982).

15. Act of May 10, 1872, ch. 152, 17 Stat. 91. Portions of The Mining Act appear at 30 U.S.C. §§ 22-24, 26-30, 33-35, 37, 39-42, 47 (1982).

16. "[R]oyalties and rentals" were required "so that the Government may not be passing to title the natural resources without receiving something in return therefor." H.R. Rep. No. 1059, 65th Cong. 3d Sess., at 20. (1919).

No premium is charged the lessee of a preference right lease for the privilege of leasing. However, both competitive and preference right lessees must pay an annual rental fee[17] and a production royalty, which is a specified percentage of the gross value of the leased substance produced. 30 U.S.C. §§ 262, 283.

Appellants contend that although section 6(i) requires the state to *lease* mineral lands, and presumably to obtain rents or royalties, the state does not in fact receive any revenues when it grants miners the right to produce hardrock minerals from state lands. Thus, appellants argue that the state's mineral disposition method is for all practical purposes a *location* system, except that miners may not receive patent to the mineral estate.

The state responds that section 6(i) does not require a revenue-producing rent or royalty; rather, that choice is left to the state legislature's discretion. The state also asserts that it receives as consideration the continued exploration and development of its lands and the benefits that come from an active mining industry.

We shall next consider the language of section 6(i) and its legislative history to glean Congress's intent in its grant and restriction of mineral lands.

B. Origin of Section 6(i)

As we have already explained in part IIB of this opinion, the restrictive language in section 6(i) was derived from the 1927 School Lands Act.[18] In Lewis, we discussed the School Lands Act in another context:

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17. The fees usually vary from 25¢ to $1.00 per acre, depending on the mineral. 1 American Law of Mining § 20.09[5] *see also* 30 U.S.C. §§ 262,283.

18. Act of January 25 1927 (An Act Confirming in States and Territories Title to Lands in Aid of Common or Public Schools), ch. 57, 44 Stat. 1026, 43 U.S.C. §§ 870-71 (1982).

43 U.S.C. § 870(b) (1983) provides:

> The additional grant made by this section is upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral rights in such lands shall be subject to lease by the State as the State legislature may direct, the proceeds and rents and royalties therefrom to be utilized for the support or in aid

(Footnote Cont.)

In 1955, the Territory of Alaska, through its legislature, provided for a constitutional convention. Elected delegates adopted a Constitution on February 5, 1956, which was ratified by the people of Alaska on April 24, 1956. This Constitution adopted by the people of Alaska served as the basis for subsequent petitions to Congress for statehood and constituted an offer to accept the privileges and responsibilities of that status in accordance with its terms.

Throughout the process of drafting the Constitution and its adoption, there was considerable public controversy surrounding the issue of federal control over Alaska's power to dispose of its mineral resources. In statehood legislation for other states, Congress had limited land grants to non-mineral lands. Public lands, which were known to be chiefly valuable for commercial mineral production at the time of the grants, were retained in federal ownership for management and disposition under a theoretically unified system of federal mineral law. In part to avoid the litigation over titles which had resulted from this policy, Congress passed the School Lands Act of 1927, 43 U.S.C. § 870. This act extended the original statehood land grants to embrace lands mineral in character. These addi-

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(Footnote Cont.)

of the common or public school: *Provided,* That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located.

> tional grants, however, were made subject to a mineral alienation condition which prohibited state disposal of land without a reservation of minerals and permitted a forfeiture action instituted by the Attorney General on behalf of the United States in the event of such disposal [43 U.S.C. § 870(b)].
>
> Although the constitutions of most states were written after passage by Congress of the relevant enabling acts, Alaska's Constitution was drafted in the absence of a pre-existing act. While the delegates were therefore unsure of the particular restrictive language which might be chosen by Congress, they were aware of the history of federal control over state disposition of mineral lands and the likelihood that the United States would insist on retaining its usual powers. To many of the delegates and the people of the state, these restrictions were unpopular.

559 P.2d at 636 (footnotes omitted). Thus, we see in the School Lands Act language echoed fifty-one years later in section 6(i) of the Alaska Statehood Act: a requirement that grantee states reserve the mineral interest when disposing of granted lands, and a provision allowing grantee states to dispose of minerals only by lease.

Implicit in this quotation from *Lewis* are several points which must be emphasized. First, prior to the enactment of the School Lands Act, the statehood land grants of many western states did not include certain "school lands" sections which were known to be mineral in character at the time for vesting.[19] *Andrus v. Utah,* 446 U.S. 500, 508, 64 L.Ed. 2d 458, 465 (1980); *see also* 3 American Law of Mining § 60.06[2], at 60-11-13. Second, if lands vested which were in fact of mineral character, *but whose mineral character was not known at the time of vesting,* the state owned the lands and minerals contained therein. *United States v. Wyoming,* 331 U.S. at 443, 91 L.Ed. at 1593.

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19. Title to surveyed sections vested at statehood; title to unsurveyed sections vested upon completion of an official survey. *United States v. Wyoming,* 331 U.S. 440, 443, 91 L.Ed. 1590, 1593 (1947).

Third, in *United States v. Sweet,* 245 U.S. 563, 572-73, 62 L. Ed. 473, 481 (1918), the Supreme Court held that congressional grants of school lands to a state conveyed no title to lands known to be of mineral character, even if the grant did not expressly reserve such mineral lands to the federal government. In other words, states received title to lands of known mineral character only when Congress expressly granted "mineral lands." Finally, the School Lands Act of 1927 served as an express congressional grant of school lands of known mineral character. Most importantly, the term "mineral lands" as used in the School Lands Act[20] is a term of art, and refers to the *time* that the mineral character of the lands was appreciated, not to the ultimately discovered nature of the lands.[21] *See also* Slaughter Memorandum *infra* p. 39.

C. Alaska Constitutional Response to Section 6(i)'s Restrictions

The School Lands Act restrictions had already been incorporated into the Alaska statehood bills pending in the 84th Congress when the delegates for the Alaska Constitutional Convention met in the winter of 1955-56. The restrictions were controversial because they signalled a change from the existing location-patent system to a leasing system. Ultimately, however, the benefits of statehood were seen to outweigh the doubts of some of the delegates concerning the section 6(i) restrictions. The state constitution was adopted containing a provision expressly consenting to the section 6(i) restrictions.[22]

However, the framers also sought to preserve key elements of the existing location-patent system should Congress permit. Thus, they adopted Article VIII, § 11, which provides:

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20. And as used in the Alaska Statehood Act § 6(i). See part IIIE of this opinion, *infra* p. 37.

21. The School Lands Act did not completely eliminate litigation of the question whether lands were of known mineral character at the time of survey, however, because the state's interest in lands of known mineral character vested on the effective date of the School Lands Act, rather than at the time of survey. *See, e.g., Rogers,* 130 P.2d 268.

22. Alaska Const., art. XII, § 13 states:

> All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people.

> Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by laws shall establish a prior right to these minerals and also a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law. Surface uses of land by a mineral claimant shall be limited to those necessary for the extraction or basic processing of the mineral deposits, or for both. Discovery and appropriation shall initiate a right, subject to further requirements of law, to patent of mineral lands if authorized by the State and not prohibited by Congress. The provisions of this section shall apply to all other minerals reserved to the State which by law are declared subject to appropriation.

According to one commentator (also a delegate to the Constitutional Convention):

> In part, this provision was inserted in the hope that Congress might recede from its restriction. On the other hand, delegates who concurred in the policy limiting permanent disposal of minerals went along with the proposal because they assumed Congress would stand firm. Most also saw the provision as a demonstration to miners, who might otherwise object to the constitution, that any restrictions applicable to alienation of mineral lands were being imposed from outside and were not the convention's doing.

V. Fischer, *Alaska's Constitutional Convention* 134 (1975).

Congress did not recede from the section 6(i) restrictions. The people of Alaska ratified the constitution in 1956. The Statehood Act was passed by Congress and signed into law on July 7, 1958. Section 8(b) of the Act required the voters to vote in favor of three propositions, one of which was that:

> (3) All provisions of the Act of Congress approved [July 7, 1958] reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people.

Alaska Statehood Act § 8(c)(1). The voters accepted each proposition at the election held on August 26, 1958, and Alaska subsequently became a state on January 3, 1959. *See generally Lewis,* 559 P.2d at 636-39.

Having examined the origin of section 6(i) and the unsuccessful efforts of Alaska's Constitutional Convention to avoid its restrictions, we now turn to the legislative history for an understanding of Congress's intent underlying section 6(i)'s grant of mineral lands and leasing restrictions.

D. Congress Intended that Alaska Receive Rents and Royalties from Section 6(i) Mineral Leases to Ensure the New State's Economic Viability

The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state. *Udall v. Kalerak,* 396 F.2d 746, 749 (9th Cir. 1968), *cert. denied,* 393 U.S. 1118, 22 L. Ed. 2d 123 (1969); *United States v. Atlantic Richfield Co.,* 435 F. Supp. 1009, 1016, 1021 n.47 (D. Alaska 1977), *aff'd,* 612 F.2d 1132 (9th Cir.), *cert. denied,* 449 U.S. 888, 66 L. Ed. 2d 113 (1980). One of the principal objections to Alaska's admittance into the Union was the fear that the territory was economically immature and would be unable to support a state government. For example, opponents of statehood claimed that "Alaska is not capable of sustaining statehood unless it is heavily subsidized by the other 48 States of the Union." 104 Cong. Rec. 9498 (1958) (statement of Rep. Smith). Similarly, another opponent to

statehood argued that "The prevailing doubt of Alaska's ability to support itself is evidenced by the generous special considerations which are made for it in this statehood act." 104 Cong. Rec. 12,297 (1958) (statement of Senator Talmadge).

The congressmen who favored statehood conceded that it would impose an additional financial burden on the territory, but they maintained that the Statehood Act sufficiently provided for Alaska's financial well-being. The land grant of 103,350,000 acres was perceived by these congressmen as an endowment which would yield the income that Alaska needed to meet the costs of statehood. Representative Dawson said that:

> All grants include the mineral rights, but these rights must be retained by the State if the lands pass into private ownership. In other words, the mineral rights will always belong to the people of Alaska, and never to private individuals . . . .
>
> These provisions are the foundation upon which Alaska can and will build to the enormous benefit of the national economy shared by her sister States. We cannot make Alaska a "full and equal" State in name and then deny her the wherewithal to realize that status in fact.

104 Cong. Rec. 9361 (1958). The importance of mineral revenue to the new state is also highlighted by the following colloquy between Representative Miller and Alaska Territorial Senator William Egan:

> Miller: Do you see where you would get much income out of this 103 million acres you might select around, bearing in mind most of the forests and good land has been set aside by the Government now, or by the military? How much income would you derive from that to begin with?
>
> Egan: As to how much income would be derived, that would be entirely problematical, depending on the values that would be found there. . . . There are known deposits of almost every type of mineral.
>
> . . . .
>
> . . . I feel there would be development . . .

Statehood for Alaska: Hearings Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 85th Cong., 1st Sess. 201-02 (1957) (remarks of Rep. Miller and William Egan, Alaska Territorial Senator and President of the Alaska Constitutional Convention).[23]

That Congress recognized the financial burden awaiting the new state is clear from its debates. It is equally clear that the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden. Congress, then, granted Alaska the mineral estate with the intention that the revenue generated therefrom would help fund the new state's government.

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23. *See also* 104 Cong. Rec. 9360-61 (1958) (further remarks of Rep. Dawson remarks of Rep. O'Brien); 104 Cong. Rec. 12,012 (1958) (remarks of Sen Jackson).

The 103,350,000 acre grant ultimately provided in section 6(a) and (b) of the Statehood Act was one of unprecedented size whether considered either absolutely or as a percentage of the total land area of the state. H.R. Rep. No. 624, 85th Cong., 1st Sess. (1957), *reprinted in* vol. 1 Alaska Statutes "History of Alaska Statehood," at 20. As the colloquy between Representative Miller and William Egan suggests, another rationale for the unprecedented size was that the federal government had already reserved the most valuable land and the new state would, in effect, have second choice. In the House, Representative Saylor said that "the choice areas, more than 95 million acres, have been reserved for Federal agencies." 104 Cong. Rec. 9340 (1958). In Senate discussion of the federal reservations, Senator Robertson read a portion of the House report on the Act: "[T]his tremendous acreage of [federal] withdrawals might well embrace a preponderance of the more valuable resources needed by the new State to develop flourishing industries with which to support itself and its people." 104 Cong. Rec. 12,019 (1958). Thus, the larqe grant of 103 million acres was deemed necessary because the lands available for state selection were perceived to be only marginally productive.

Furthermore, Congress recognized that the agricultural potential of the statehood grant land was limited. In debate, Senator Byrd commented: "In all of the more than 365 million acres of land in Alaska, only 2 million or about one-half of 1 percent, are arable." 104 Cong. Rec. 12,336 (1958). Because Congress realized that agricultural development would not yield the revenue that Alaska would need to support statehood, the Act contained the provision granting the new state title to the mineral estate underlying the land grants. Senator Kuchel said in debate:

> I believe, however, on the basis of the values of property in Alaska as they have been estimated, the tremendous wealth in the ground in minerals...,the State of Alaska will be able to make maximum use of the property which it will obtain under the bill from the Federal Government. This provision constitutes one additional assurance. I feel sure that economically the new government will succeed.

104 Cong. Rec. 12,035 (1958).

The leasing restriction[24] in section 6(i) was intended to further the goal of state revenue production. As we have discussed, the restriction was taken from the 1927 School Lands Act. That language was copied advisedly so that Alaska would be on an equal but not a favored footing with other public land states with respect to the

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24. Appellants and the state agree that the third sentence of section 6(i) requires that mineral deposits be disposed of only by lease. Intervenor Alaska Miners Association argues that the "shall be subject to lease" language is merely permissive "[A]11 that this sentence requires is that 'leasing' be one of the mechanisms through which these lands would be made available for mining development. It does not require that leasing be the *only* disposal mechanism." (Emphasis in original.)

The Miners' position on this point is contradicted by the structure of section 6(i). If the third sentence was not meant to express the exclusive method of mineral disposition, it need not have been set forth at all. Further, the legislative history demonstrates a uniform belief that section 6(i) required leasing. For example, the Senate Committee Report concerning language that eventually became section 6(i) states:

> Subsection (k) [of S. 50, 83d Cong., 2d Sess. (1954)] provides that all grants made or confirmed under the act shall include mineral deposits. Thus, the fact that the lands desired by the State are known or believed to be valuable for minerals will not preclude the State from exercising its right of selection with respect to them under the several grants. *However, in order to give an added measure of protection to the new State government, which inevitably will be inexperienced and untried, the committee amendment provides for certain restrictions* upon the disposition by the State of mineral lands which it may select under the 100-million-acre grant provided in subsection (b) or the 2,550,000-acre grant made in subsection (c). The restrictions are that the State must retain title to all the minerals in these lands, whenever any of them are sold or granted. *The State may dispose of the minerals in these lands only by lease* in such manner as the State legislature may direct.

S. Rep. No. 1028, 83d Cong., 2d Sess. 32 (1954) (emphasis added).

The Miners' argument that Congress intended the "shall be subject to lease" provision to be permissive is belied by the Miners' testimony objecting to this provision before the House Subcommittee on Territorial and Insular Affairs on March 15, 1957:

(Footnote Cont.)

disposition of mineral lands.[25] The School Lands Act leasing requirement was expressly intended to be productive of proceeds, rents, and royalties, and congressional history indicates that the same result

(Footnote Cont.)

> Following is the statement of the Alaska Miners Association relative to *mandatory leasing of mineral rights* on all lands reserved to the new State of Alaska.
>
> . . . .
>
> We. . . . believe that the grant of mineral rights on all these lands was done to aid the new State in meeting the added expense of statehood . . . .
>
> We believe that the well-intended actions contained in the enabling legislation will have an adverse effect and the *mandatory leasing of mineral rights* by the new State of Alaska under the conditions imposed would irreparably damage the development of Alaskas mineral resources . . . .
>
> We believe that the Legislature of the State of Alaska should be allowed to determine the disposition of the mineral rights on all State lands except those specifically reserved for schools . . . .
>
> All lands so claimed [by the state] shall have the mineral deposits reserved to the State and *it shall be mandatory that the State lease the mineral rights;* forfeiture of rights could result if disposed of contrary to provisions in the bills.

Statehood for Alaska: Hearings on H.R. 50, H.R. 628, and H.R. 849 Before the Subcommittee on Territorial and Insular Affairs, 85th Cong., lst Sess. 217-18 (1957) (statement of Glen D. Franklin, Chairman, Legislative Committee, Alaska Miners Association) (emphasis added) (hereafter *"Hearings on H.R. 50").* Thus, it is clear that the Miners Association recognized in 1957 that section 6(i)'s provision requiring that mineral lands be subject to leasing was a mandatory provision. Their argument to the contrary today is without merit.

> 25. In other words, the thought was that Alaska should be allowed to obtain mineral lands only if it would administer them in substantially the same manner that States now having mineral land grants are required to administer the lands obtained by them under those grants. This is evident from the close parallelism between the conditions proposed to be imposed upon Alaska and those contained in the 1927 [School Lands] act. (Footnote Cont.)

was intended in Alaska.[26] Further, in congressional hearings, the section 6(i) leasing requirement was equated with the "leasing procedures as provided under the Leasing Act of 1920."[27] As previously noted, the federal Mineral Leasing Act was passed rejecting the location system for certain minerals in order to provide revenue to the United States.

Moreover, although the mineral leasing systems of other states differ from the federal mineral lands leasing system, they are uniform in requiring the payment of rent, or royalties, or both. 3 American Law of Mining § 63.054(d), at 63-28.

> State statutes may be divided into two principal categories describing the manner of payment of consideration for a lease; first, those that require both rents and royalties but credit the former against the latter or cease rental when the payment of royalties begins; second, those that require both rents and royalties as distinct and independent considerations.

Id. at 63-29 (footnotes omitted). We therefore conclude that the leasing requirement in section 6(i), considered in the context of the School Lands Act, the Mineral Leasing Act, other statehood mineral

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(Footnote Cont.)

Memorandum from Herbert J. Slaughter, Chief, Branch of Reference, Division of Legislation, Department of the Interior, to the Honorable E.L. Bartlett, at 7-8 (Nov. 7, 1955) (regarding the mineral lands provision of the Alaska Statehood bills) (hereafter "Slaughter Memorandum").

26. S. Rep. No. 1028, *supra* n.24 (noting the "similar provision for the protection of the mineral school lands," in the School Lands Act); Slaughter Memorandum, *supra* n. 25. In *State v. Lewis,* we explained that

> The lands to be selected by the state included mineral lands so as to be consistent with the rights granted other states as a result of the School Lands Act of 1927. . . . The restrictions placed by Congress on alienation of Alaska's lands were of the same import as those set forth in that Act and applicable to other states.

559 P.2d at 638.

27. Hearings on H.R. 50, *supra* n.24, at 220 (Rep. Aspinall); *see also id.* at 231 (Rep. Abbott).

grants, [28] and mineral leasing systems in other states, mandates a system under which the state must receive rent or royalties for its mining leases.[29]

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28. *See, e.g.*, Oklahoma Statehood Act, Act of June 16, 1906, 34 Stat. 267, 273 (expressly including mineral lands, but prohibiting state from disposing of such mineral lands except by short-term lease). Statehood mineral grants are to be considered in light of the mining policies in existence at the time the grants are enacted. Utah v. Bradley Estates, 223 F.2d 129, 130 (10th Cir. 1955).

29. The state argues that the language in the third sentence of section 6(i), "as the state legislature may direct," gives the state the discretion not to charge rent or royalties. It cites as authority for this proposition language from the Slaughter Memorandum. The memorandum first discusses earlier Alaska statehood proposals allowing the state to sell lands it selected, including mineral rights, with a reservation of a royalty on all minerals produced therefrom. Concerning these proposals, the memorandum states:

> These earlier proposals, it will be noted, differ in a number of respects from the restrictions contained in the bills now pending. In particular, the current language expressly calls upon Alaska to adopt a mineral leasing system, while the earlier versions permitted the mineral deposits to be disposed of along with the surface, provided a royalty interest was reserved by the State. On the other hand, the current language does not attempt to prescribe maximum or minimum rates of royalty as did the earlier versions, but appears to leave the terms of leasing wholly to the discretion of the State legislature. From a practical standpoint, this second difference may be more important than the first, since if the Alaska legislature is left, as H.R. 2535 and S. 49 now intend to provide, with the untrammelled [sic] right to frame its own mineral leasing laws, it can, if it so ch[o]oses, establish priorities that will tend to keep the surface and mineral rights in the same hands and can, in general, fit the provisions of its mineral leasing system to whatever may be its concepts of the public interest.

Slaughter Memorandum, *supra* n.25, at 9-10.

We are unable to read this language in Slaughter's memorandum as broadly as the state suggests. The memorandum does not suggest that the state was free from the duty to charge rent or royalties. In fact, Slaughter states that "Alaska should not be accorded greater freedom in the administration of mineral lands than that accorded existing States having Congressional land grants." *Id.* at 2. As noted previously, other states under the School Lands Act were required to lease mineral lands in order to generate rents and royalties.

Although Alaska law requires mining leases for extracting hardrock minerals on those mineral lands thought to be subject to section 6(i),[30] the statutes do not require the payment of rent or royalties. AS 38.05.205, .210. Alaska Statute 38.05.205(b) speaks of an annual rental of not less than the annual labor requirement which would be imposed if the lease were a location. However, no rent actually needs to be paid, because the lessee may credit the value of annual labor performed against the rental. Annual labor is required to ensure that the claim is worked so that the miner does not locate numerous claims and obtain the right to exclude others. 2 American Law of Mining § 7.2, at 102 (lst ed. 1983); *Chambers v. Harrington*, 111 U.S. 350, 353, 28 L. Ed. 452, 453 (1884) ("Clearly, the purpose was . . . to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith and to show that he was not acting on the principle of the dog in the manger."). It is not a source of revenue to the landowner. Alaska's mineral leases are in substance indistinguishable from state mining locations.[31] Because they do not require rents or royalties, the state hardrock mineral leasing laws do not meet the leasing requirement of section 6(i).

E. The Section 6(i) Leasing Requirement Applies Only to Statehood Grant Lands Whose Mineral Character was Known at the Time of State Selection.

The appellants argue that the section 6(i) leasing requirement applies to all lands granted under section 6(a) and (b) which contain minerals. Their argument may be summarized as follows. Under the first sentence of section 6(i), all mineral deposits in selected lands are conveyed regardless of when the deposit's existence is first known. The term "mineral lands" in the second sentence of section 6(i), to which "such lands" in the third sentence of section 6(i) relates, refers to the same subject as the "mineral deposits" grant of the first sentence.

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30. "Hardrock" minerals are those which were subject to location under federal mining laws as of the beginning of statehood, January 3, 1959. A.S. 38.05.185.

31. A letter authored by John Sims, Director of State Office of Mineral Development, described the proposed state leasing system which is now reflected in AS 38.05.205 as a system "which allows a miner on State land virtually all the rights and privileges of the 1872 Federal Mining Law with the express exclusion of patent right." Letter from John Sims, Director, Alaska Office of Mineral Development, to Howard J. Grey, Executive Director, Alaska Miners Association (Feb. 23, 1981).

Thus, all lands containing minerals are subject to the leasing requirement, regardless of when the minerals are discovered.

We agree with appellants that the grant language of the first sentence of section 6(i) contains the key to understanding the scope of the leasing requirement. We do not agree, however, that the grant language was intended to convey mineral deposits in selected lands whose mineral character was unknown at the time of selection. Unknown deposits would be conveyed automatically as a part of the section 6(a) and (b) grants without the use of the section 6(i) grant language. The section 6(i) grant was necessary so that *known* mineral deposits would be conveyed. *See* notes 19-21 and accompanying text, *supra.*

This interpretation is confirmed by the Senate Report on an early statehood bill (S. 50, 83d Cong., 2d Sess., (1954)) which states:

> By the terms of previous statehood bills, and of S. 50 as introduced, the State was to have been permitted, under the land-grant provisions of those bills, to select large acreages of land, but in all previous bills, the State would have been estopped from choosing ...those lands known or even believed to be mineral in character. These severe limitations in previous statehood bills on the State's right to select were not always apparent from the bare language of those measures. Yet they existed within the legal and judicial interpretations which have heretofore been given as to the meanings of certain words and phrases of these previous proposed statehood bills.
>
> If all the resources of value were withheld from the State's right of selection, such selection rights would be of little value to the new State. As a part of this new approach toward statehood, your committee has felt obligated to broaden the right of selection so as to give the State at least an opportunity to select lands containing real values, instead of millions of acres of barren tundra.

> To attain this result, the State is given the right to select lands known or believed to be mineral in character (subsection k of section 5) . . . [32]

S. Rep. No. 1028, *supra* n.24, at 6. The Report explains that subsection 5(k), the precursor to section 6(i), "provides that all grants made or confirmed under the act shall include mineral deposits. Thus, the fact that the lands desired by the State are known or believed to be valuable for minerals will not preclude the State from exercising its right of selection with respect to them under the several grants." *Id.* at 32.

The need for and the meaning of the grant language is also confirmed in the Slaughter Memorandum:

> The bills in the 84th Congress for the admission of Alaska into the Union contain a provision which affirmatively declares that the land grants made or confirmed by those bills shall include mineral deposits, and which then proceeds to impose certain express restrictions upon the manner in which Alaska may administer any mineral lands so obtained by it. . . .

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32. The report of the Committee on Interior and Insular Affairs on H.R. 7999, which became the Statehood Act, in language reminiscent of the Senate Report makes the same point:

> If the resources of value are withheld from the State's right of selection, such selection rights would be of limited value to the new State. The committee members have, therefore, broadened the right of selection so as to give the State at least an opportunity to select lands containing real values instead of millions of acres of barren tundra.
>
> To attain this result, the State is given the right to select lands known or believed to be mineral in character (sec. 6(i)).

H.R. Rep. No. 624, 85th Cong., 2d Sess. (1957), *reprinted in* 1958 US Code Cong. & Admin. News 2933, 2939. The Committee thus used the phrase "lands known or believed to be mineral in character" as synonymous with the "mineral deposits" language in the first sentence of section 6(i).

> The reasoning which prompted the adoption of the provision in question by the Senate Committee is understood to be (1) that mineral deposits must be expressly mentioned in order for mineral lands to be encompassed by a Congressional land grant to a State; and (2) that Alaska should not be accorded greater freedom in the administration of mineral lands than that accorded existing States having Congressional land grants. . . .
>
> With respect to those situations where, as was true of the Utah grants and the California school section grant, the law making the grant neither affirmatively included nor affirmatively excluded mineral lands, the Supreme Court has held that the failure to mention mineral lands was tantamount to an express exclusion of them from the grant. . . .
>
> The members of the Senate Committee on Interior and Insular Affairs who took an active part in the study of S. 50, 83d Congress, considered that, in the light of the holdings of the Supreme Court, statutory language expressly including mineral deposits within the contemplated land grants to Alaska would probably be necessary in order for these grants to encompass mineral lands.

Slaughter Memorandum, *supra* n.25, at 1-6 (citation omitted). Thus, the grant of mineral deposits in the first sentence of section 6(i) and the term "mineral lands" as used in the second sentence of section 6(i) both relate to mineral deposits in lands of known mineral character.

Appellants cite as support for their interpretation testimony of a representative of the Alaska Miners' Association before the House Subcommittee on Territorial and Insular Affairs on March 15, 1957. The representative, Mr. Franklin, assumed that mandatory leasing applied to all lands selected under what is now section 6(a) and (b)

of the Statehood Act. *See supra* n.24. Several congressmen seemed to join in this assumption. However, the question whether all lands selected under section 6(a) and (b), or merely those lands known to be mineral in character at the time of selection, would be subject to mandatory leasing was not addressed.

Appellants also point out that S. 50, as amended by the Committee on Interior and Insular Affairs (83d Cong., 2d Sess. (1954)), and H.R. 2536 (83d Cong., 2d Sess. (1954)), which closely followed the language of S. 50, contained a final sentence which provided: "For the purposes of this subsection the mineral character of lands granted to the State of Alaska shall be determined at the time patent issues and the patent shall be conclusive evidence thereof." This language was stricken at the request of Delegate Bartlett who stated:

> That amendment is offered at the suggestion of the Governor of Alaska and the Land Commissioner of Alaska. They were somewhat apprehensive about the rapidity with which lands would move to the new State if the requirement remained in that the mineral character of all the land would have to be determined in advance. And the rights of the United States, the attorneys tell me, are adequately protected in the foregoing part of that subsection.

Hawaii-Alaska Statehood: Hearings Before the Committee on Interior and Insular Affairs, 84th Cong., 1st Sess. 332 (1955) (statement of Delegate Bartlett) (hereafter *"Interior Committee Hearings").* The committee chairman asked Delegate Bartlett: "It is your view, Mr. Bartlett, that language is surplusage and is not necessary?" Delegate Bartlett answered: "I do not think it is surplusage, but I will agree with the Governor and the Commissioner of Lands of Alaska, that had best be deleted." *Id.* The appellants argue that by agreeing to the deletion of this language, Congress must either have intended to utilize the traditional test of mineral lands or to define mineral lands as those containing minerals no matter when the minerals are discovered. The argument continues that since Congress was aware that considerable litigation had resulted under the enabling acts of other states as to whether lands were or were not mineral in character, Congress could not rationally have intended to employ the traditional test.

While we agree that administrative problems would be avoided if the section 6(i) limitations applied to all lands granted under section 6(a) and (b), we think it is reading too much into the deletion of the quoted language to conclude that Congress meant by the deletion to change the meaning of "mineral lands" as used in the second sentence of the section. The "determination at patent" language demonstrates that Congress intended the section 6(i) limitations to apply only to section 6(a) and (b) lands of known mineral character. If this were not so there would be no reason for the determination of mineral character at patent. There is no suggestion that Congress intended to change the meaning of "mineral lands" in the second sentence by deleting the final sentence. Both the Chairman and Delegate Bartlett referred to this amendment as "pro forma," a characterization which could not accurately be used if the amendment were intended to change the definition of mineral lands. *Interior Committee Hearings, supra* p. 41, at 331, 333.

Appellants' final point is that construing "mineral lands" to mean all lands where minerals are found would further the congressional policy of assuring that the State of Alaska not squander the resources which it was granted. While it is true that the broader definition of mineral lands advocated by appellants would extend the protection of the section 6(i) restrictions, that does not mean that those restrictions were meant to have the reach which appellants contend. The context and history of section 6(i) heretofore cited persuades us that its restrictions were intended to apply only to lands whose mineral character was known at the time of selection.[33]

CONCLUSION

We conclude that appellants have standing to maintain this declaratory judgment action, that the state's mineral leasing system violates section 6(i) of the Statehood Act because it does not require the payment of rent or royalties on mining leases, and that section 6(i) applies only to those lands known to have been mineral in character

---

33. For convenience, we have referred to the relevant event as the time of selection. Whether this is the time that the state files its selection application, or some later event such as the tentative or final approval of the selection, is not an issue in this case or on which we express an opinion. Further, we observe that there is room for debate concerning how much must be known about the mineral character of selected lands to qualify them as mineral lands. We also intimate no view on this question as it is not before us.

at the time of state selection. Appellants' state constitutional and public trust theories depend on the meaning of the grant and restrictions of section 6(i). Since section 6(i) directly controls, we have no occasion to examine those theories further. For the above reasons, the judgment is REVERSED and this case is REMANDED with directions to enter a declaration in accordance with this opinion and for such other further proceedings as may be appropriate.[34]

---

34. The intervenors raise several other points in defense of the judgment below. We have examined each of them and find that they lack merit.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

TRUSTEES FOR ALASKA, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
STATE OF ALASKA, et al.,	)
	)
Defendants,	)
	)
ALASKA MINERS ASSOCIATION, et al.,	)
	)
Defendants-Intervenors.	)
	)

Case No. 3AN-83-9862 Civil

MEMORANDUM DECISION AND ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

The issues presented in this case were raised when plaintiffs Trustees For Alaska, et al. ("Trustees") filed their motion for summary judgment on May 23, 1984, defendants State of Alaska, Department of Natural Resources, et al. ("State") opposed plaintiffs' motion and cross-moved for summary judgment on May 29, 1984. Several parties, including the Alaska Miners Association, Fairbanks North Star Borough, and Joseph Vogler, intervened in this action and joined defendants' cross-motion for summary judgment and/or filed their own motions for summary judgment herein. Oral argument was held herein on November 20, 1984, and supplemental briefing on the issue of standing was submitted shortly thereafter. Also, an amicus curiae brief was submitted by the Resource Development Council. The Court then took the parties' cross-motions for summary judgment under advisement.

Plaintiffs and defendants/intervenors agree and the Court finds, that there are no issues of material fact presented by the parties' cross-motions for summary judgment, and that the issues raised by such motions are legal ones. The issues all concern the interpretation

of state and federal law for which imposition of summary judgment is appropriate.

For the reasons discussed below, the Court concludes that defendants/intervenors' motions for summary judgment must be GRANTED and plaintiffs' motion for summary judgment must be DENIED.

Plaintiffs contend that the mining location system adopted under AS 38.05.185 *et seq.* fails to comply with § 6(i) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (1958). Plaintiffs argue that § 6(i) requires the state to charge reasonable rents for the production of hard rock minerals from state land, and that the state has failed to do so. Plaintiffs further argue that § 6(i) of the Statehood Act is incorporated into Alaska's Constitution, and that the state's alleged failure to charge rent or royalties for mineral extraction also violates the state's constitution, as well as the "compact" between the state and federal governments. Finally, plaintiffs argue that Article VIII of Alaska's Constitution creates a public trust doctrine, which the state has allegedly violated.

Defendants and defendants/intervenors challenge plaintiffs' standing and/or the existence of a private cause of action by which to raise the foregoing issues. To the extent plaintiffs have standing and a viable cause of action, defendants and defendants/intervenors argue that the state's mineral production license system essentially complies with § 6(i) of the Statehood Act, and that plaintiffs' "public trust" doctrine arguments are without merit.

Standing/Private Cause Of Action/Jurisdiction

Initially, the Court concludes that plaintiffs lack standing to seek judicial resolution of these issues here. Whether a party has standing depends on whether the party has "sufficient personal stake in the outcome of the controversy." This requirement has been described in terms of "injury in fact" and that "its purpose is to assure the adversity which is fundamental to judicial proceedings." *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976); *Hoblit v. Commissioner of Natural Resources*, 678 P.2d 1337, 1340-41 (Alaska 1984). On the evidentiary record in this case, plaintiffs have, in this Court's view, failed to establish the requisite individualized harm, direct interest, or personal state [sic] in the mineral resources being managed under the statutory scheme challenged here. *See State v. Lewis*, 559 P.2d 630, 650 (Alaska 1977) (Burke, dissenting.

Plaintiffs argue, however, that *Lewis* controls and would confer standing on them. First, the Court notes that the broad

standing policy enunciated in *Lewis* may have been narrowed recently by the Alaska Supreme Court, *See e.g., Hoblit v. Commissioner of Natural Resources*, 678 P.2d 1337 (Alaska 1984). There, the Court emphasized that "representation of the public will not itself confer standing unless the plaintiff first demonstrates a sufficient 'personal stake' in the outcome of the controversy." *Id.* at 1340. n.3.

More importantly, however, this Court concludes that *Lewis* is distinguishable from the instant case insofar as there exists a potential party who *is* in a better position than plaintiffs to challenge the state's alleged failure to comply with § 6(i) of the Statehood Act — the United States government. Central to the holding in *Lewis* was the Supreme Court's finding that "there is no one in a better position to complain of the constitutional violations alleged" in that case than the citizen/taxpayer-plaintiffs. Here, however, the United States government has a direct and immediate interest in ensuring that the state is complying with the terms of the Statehood Act. Indeed, the last sentence of § 6(i) expressly provides that:

> [A]ny lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

Defendant/intervenor Alaska Mining Association also argues that § 6(i) neither creates a private cause of action for concerned citizens to seek the enforcement of such provision in state court, nor confers on state court jurisdiction by which to adjudicate such dispute. Defendant argues that jurisdiction for the adjudication of the issue of the state's compliance or noncompliance with the terms and provisions of the Statehood Act, including § 6(i) — a federal statute — have been expressly and exclusively conferred upon federal court through the last sentence of § 6(i). The Court agrees with defendant/intervenor's contention that § 6(i) of the Statehood Act does not create a cause of action for private litigants to seek enforcement of the terms of that provision. Given this conclusion, the Court finds it unnecessary to reach the question of whether the state court has jurisdiction to adjudicate the issues raised by plaintiffs.

Accordingly, this Court concludes that plaintiffs' action must fail, as a matter of law, as a result of plaintiffs' lack of standing and

the absence of a viable, private cause of action for the enforcement of § 6(i).

Compliance With § 6(i)

Assuming, however, that plaintiffs have standing and a viable, private cause of action by which to challenge the state's alleged noncompliance with § 6(i), (and assuming further that this Court has jurisdiction to adjudicate such issue), the Court concludes that the state's mineral management scheme in general, and that the production licensing procedure in particular (AS 38.05.207), essentially comply with the requirement of § 6(i) that "mineral deposits...shall be subject to lease by the state... ." although the statute refers to the property interest conferred upon miners as a "license" rather than a "lease," the Court concludes that the statutory scheme essentially establishes a lease-type arrangement. No fee simple interest or permanent possessory interest is conveyed; the state may revoke or limit such interest under certain circumstances; and an exchange of consideration is required in order to obtain such interest. Specifically, the consideration required is the miner's performance of annual labor of at least $200 per year per mining claim. AS 38.05.210. That such consideration takes the form of services, rather than cash rent or royalty payments, is, in this Court's view, legally insignificant.

As the Court understands it, the gravamen of plaintiffs' compaint is that the state is not exacting cash rent or royalty payments or sufficient in-kind consideration for the extraction of hard rock minerals. Plaintiffs argue that the state's mineral management scheme is a "giveaway" program and that the $200 annual labor requirement is, at best, merely "nominal" consideration or a "sham" payment. The Court disagrees. In this Court's view, the question of the exact *amount* of consideration to be paid for the right to develop hard rock minerals — i.e., whether the $200 annual labor requirement should be substantially increased and/or required to be paid in the form of cash — is a policy question for resolution by the legislative rather than judicial process. In this regard, the Court notes that Congress conferred broad discretion upon the state legislature to fashion an appropriate mineral lands management scheme when, in § 6(i), it provided that "mineral deposits in such lands shall be subject to lease by the state *as the state legislature may direct.*" (Emphasis added.). The exact amount and form which such consideration should take are thus left to the broad discretion of the state legislature, and the political process embodied therein.

Article VIII - Alaska's Constitution

Finally, plaintiffs contend that the state's alleged failure to comply with § 6(i) violates Article VIII of Alaska's Constitution, that the terms of § 6(i) are allegedly incorporated in Article VIII, that such alleged noncompliance violates a "public trust" doctrine allegedly created by Article VIII, and that such noncompliance further violates the state-federal "compact" established by the Statehood Act. The Court concludes that these arguments also lack merit.

First, the Alaska Supreme Court has expressly held, in *State v. Lewis*, 559 P.2d 630, 639 (Alaska 1977), that Alaska's Constitution was not amended by the Statehood Act, and does not include § 6(i) as an implied provision of Article VIII. Second, the Court rejects plaintiffs' contention that Article VIII creates a "public trust" doctrine, which imposes fiduciary obligations on state officials, enforceable by concerned citizens or taxpayers through a private cause of action, to manage natural resources in a manner consistent with such citizens' interpretation of the state constitution. *See State v. Lewis, supra,* 559 P.2d at 635 n. 15 (recognizing Art. VIII, § 16 of the Alaska Constitution which confers on the governor the authority to enforce state compliance with constitutional requirements). Nor have plaintiffs cited the Court to competent authority recognizing the viability of such privately enforceable "public trust" doctrine under the state constitution. Finally, for the reasons discussed above, the Court rejects plaintiffs claims that any alleged breach of the federal-state "compact," i.e., the Statehood Act, may be adjudicated by concerned citizen/taxpayer-plaintiffs in a private cause of action in state court.

CONCLUSION

For the foregoing reasons, the Court concludes that defendants' and defendants/intervenors' motions for summary judgment must be GRANTED and plaintiffs' motion for summary judgment must be DENIED.

DATED at Anchorage, Alaska this 14th day of June, 1985.

Douglas J. Serdahely
Judge of the Superior Court

(2) (3)

No. 87-205, No. 87-206

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1987

—o—

ALASKA MINERS ASSOCIATION, *Petitioner,*

v.

TRUSTEES FOR ALASKA, *et al., Respondents,*

and

STATE OF ALASKA, *et al., Respondents,*

and

FAIRBANKS NORTH STAR BOROUGH, JOSEPH VOGLER, *Respondents.*

—o—

STATE OF ALASKA, *et al., Petitioners,*

v.

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FAIRBANKS NORTH STAR BOROUGH, JOSEPH VOGLER, *Respondents.*

—o—

ON PETITIONS FOR WRIT OF CERTIORARI TO THE ALASKA SUPREME COURT

—o—

BRIEF OF RESPONDENT, FAIRBANKS NORTH STAR BOROUGH, IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI Filed By STATE OF ALASKA and ALASKA MINERS ASSOCIATION

—o—

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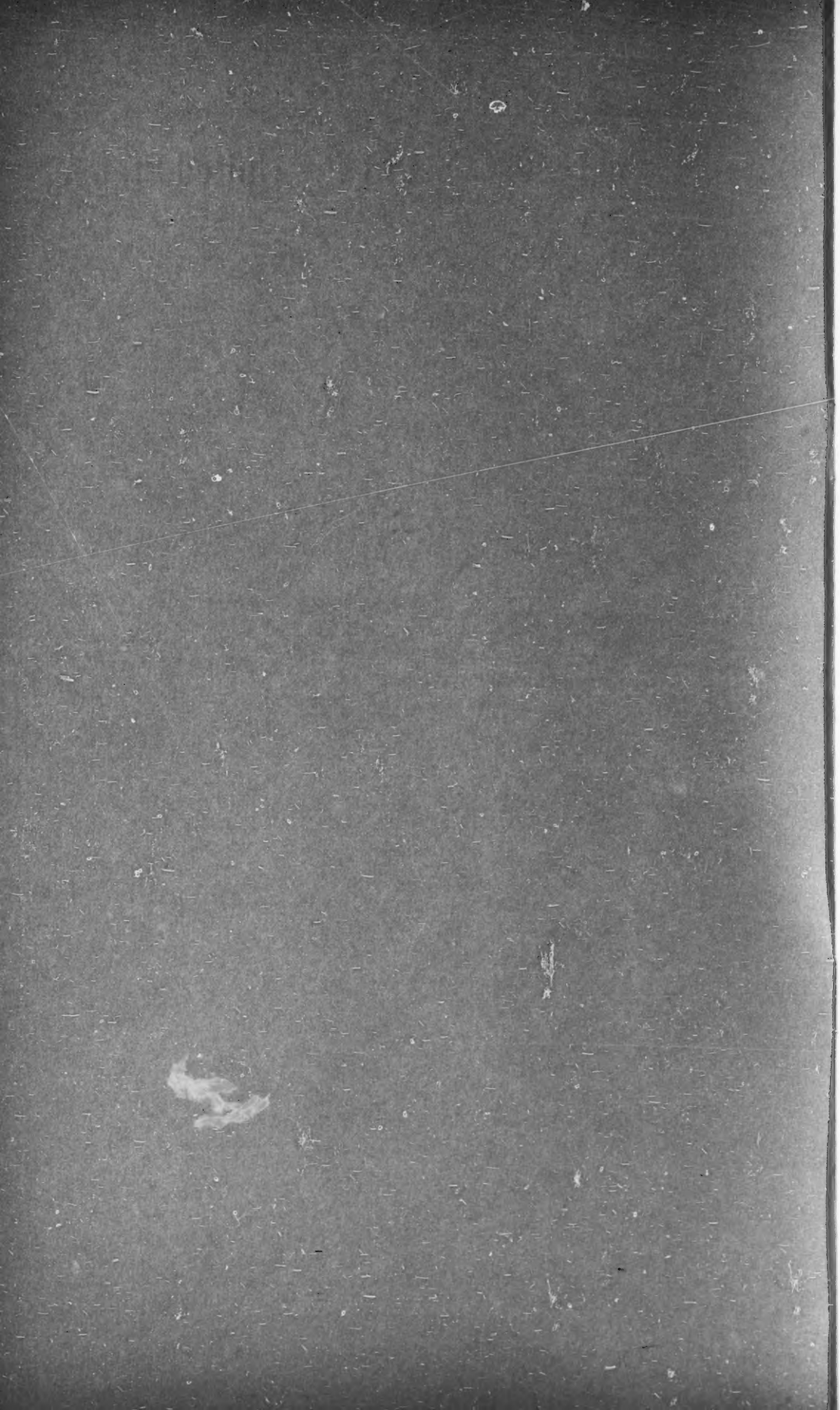

QUESTIONS PRESENTED

Respondent, Fairbanks North Star Borough, adopts by reference the questions presented by the State of Alaska and the Alaska Miners Association.

LIST OF PARTIES

Respondent, Fairbanks North Star Borough, adopts by reference the list of parties presented by the State of Alaska and the Alaska Miners Association.

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No. 87-205, No. 87-206

In The

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October Term, 1987

ALASKA MINERS ASSOCIATION, *Petitioner,*

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and

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FAIRBANKS NORTH STAR BOROUGH, JOSEPH VOGLER, *Respondents.*

STATE OF ALASKA, *et al., Petitioners,*

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FAIRBANKS NORTH STAR BOROUGH, JOSEPH VOGLER, *Respondents.*

ON PETITIONS FOR WRIT OF CERTIORARI TO THE ALASKA SUPREME COURT

BRIEF OF RESPONDENT, FAIRBANKS NORTH STAR BOROUGH, IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI Filed By STATE OF ALASKA and ALASKA MINERS ASSOCIATION

INTRODUCTION

This response is in support of two separate petitions for writ of certiorari filed in the same case below, *Trustees for Alaska v. State of Alaska*, Case No. S-1142,

slip op. (Alaska May 1, 1987). Petitions for writ of certiorari were filed by the Alaska Miners Association and the State of Alaska. Respondent, Fairbanks North Star Borough (Fairbanks), defendant-intervenor in the case below, supports both petitions.

OPINIONS BELOW

The petitions are in support of review of *Trustees for Alaska v. State of Alaska,* Case No. S-1142, as reproduced in the appendices of Alaska Miners Association and State of Alaska.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(3) as explained in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

STATUTE INVOLVED

The petitions challenge the Alaska Supreme Court's interpretation of Section 6(i) of the Alaska Statehood Act, 72 Stat. 339 (1958), codified at the note preceding 48 U.S.C. § 21:

> "All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the

minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: *Provided,* That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska." (Emphasis in original.)

STATEMENT OF THE CASE

Fairbanks adopts the statements of the case set out by the Alaska Miners Association and the State of Alaska with the following elaboration.

There are two fundamental concerns in this case. First, actions of the Alaska state courts have called into question the degree to which a state court may act to enforce federal law when Congress gives the exclusive role of enforcement to the United States. Second, while improperly interpreting federal law, the Alaska Supreme Court ignored the specific directives of that law requiring that the terms of Alaska's mineral leasing system should be set by the state legislature. Instead the court held that a totally unrelated federal statute should define the terms of state mineral leasing. These errors threaten the independence and economic viability of the state land mining industry, upon which Fairbanks is dependent in part for its economic vitality.

When Congress passed the Alaska Statehood Act a fundamental compact between the state and the federal

government was created. As part of the Alaska Statehood Act the state was given the right to select 104 million acres of federal land for itself. Unlike the initial statehood land grants to other states, Congress allowed the state to select both mineral and nonmineral lands as part of the selection process in order to ensure that the state would have an adequate resource base to make statehood a self-supporting proposition.

To prevent the state from squandering this resource, Congress placed restrictions on how the state could manage its own resources. Specifically, in Section 6(i) of the Statehood Act Congress provided with respect to "mineral lands" that whenever the surface estate on mineral lands is disposed of the state must retain the mineral rights for itself. Second, Congress provided that mineral deposits in "such" lands "shall be subject to lease by the State *as the State legislature may direct.*" Section 6(i) (emphasis added). Third and finally, Congress decided that in the event the state should violate the terms of this section, the United States could bring an action in forfeiture in the state courts.

Trustees for Alaska, *et al.* (Trustees), respondents in these petitions, and plaintiffs and appellants in the court below, have been steadfast opponents of the mining industry in the State of Alaska. Convinced that the present system of mineral leasing on state lands encourages the industry, the opponents of mining have long been attempting to convince the Legislature to change the system and impose instead high rents or royalties based on some ill-defined conception of "fair market value." Fortunately, the Legislature has been unwilling to accede to these requests.

Unsuccessful before the Legislature, Trustees set out to convince the state courts that when Section 6(i) calls for mineral leasing, it is actually calling for a leasing system with rents and royalties based upon "fair market value" and modeled after the federal Mineral Leasing Act of 1920. In this attempt, the Trustees have so far been successful in convincing the Alaska Supreme Court that the Statehood Act has been violated. The state court found the Act requires rents or royalties because the definition of lease in Section 6(i) is dictated by federal laws such as the Mineral Leasing Act of 1920.

This ruling ignores the plain language of the Statehood Act that only the state legislature may define the terms of mineral leases, that only the United States may bring an action to enforce the Statehood Act, that the definition of a mineral lease is not dictated by federal law, and that the state has had a fully effective mineral leasing system in place for years.

———o———

REASONS FOR GRANTING THE WRITS

I

THE ALASKA SUPREME COURT VIOLATED CONGRESS' WILL WHEN IT EXERCISED JURISDICTION TO DETERMINE WHETHER ALASKA HAS COMPLIED WITH SECTION 6(i) OF ITS STATEHOOD ACT

As discussed in the petitions of both the State of Alaska and the Alaska Miners Association, Section 6(i) provides that the United States is the only entity with jurisdiction to bring suit based on any alleged violations

of the Statehood Act. The legal reasoning for finding no private right of action to enforce the terms of the Statehood Act is set out in the petitions of the State of Alaska and the Alaska Miners Association. State of Alaska petition at 20-33; Alaska Miners Association petition at 6-9.

As stated in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14-15 (1981), " 'it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' " One of the dangers alluded to in *Middlesex County* is precisely the problem presented to this Court. Congress recognized a need to limit jurisdiction to federal courts and restrict the enforcement of certain statutes to particular parties to ensure informed, uniform interpretations of the law. While purporting to interpret federal law the state court hopelessly confused the basic principles governing the interpretation of federal law and allowed parties, not authorized by Congress, to sue to enforce a federal law.

For example, one of the most basic jurisdictional principles of federal law is that only those parties with an actual stake in the outcome of a dispute have standing to invoke the jurisdiction of the federal courts. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Yet the state court ignored this principle and found Trustees had standing. It is simply inconceivable that Trustees, relying on the status of "taxpayers" and "citizens," would have obtained standing in federal courts to challenge a state's compliance with the Statehood Act. Yet,

by permitting Trustees to maintain this suit, the most basic principles of the relationship between the federal government and the State of Alaska have been adjudicated at the behest of a party whose only *real* interest in this case is to discourage the mining industry. In a nutshell, the court below reasoned that Trustees should be permitted to bring this suit because they are capable and no one else has availed themselves of the opportunity. Alaska Miners Association appendix at A-14 to A-15.

Fairbanks submits that it is critical for the Court to grant the writs to clarify for state courts that such a momentous issue as the interpretation of the Alaska Statehood Act is more suitably decided in federal courts with the United States as an active party, especially when Congress expressly lays out the appropriate procedure to do this in the Statehood Act.

II

THIS COURT SHOULD REVIEW THIS CASE TO CORRECT SERIOUS MISINTERPRETATIONS OF FEDERAL LAW

There are few documents as crucial to the relationship between the State of Alaska and the federal government as the Statehood Act. The Alaska Supreme Court's interpretation of Section 6(i) has distorted the meaning of that Act, and has done so to the detriment of important principles of state sovereignty. To restore the proper balance between state and federal relations, this Court should review the decision below.

With Section 6(i) Congress gave the state the right to select mineral lands. Congress also placed certain restrictions on the state's ability to alienate those mineral

lands, namely that on certain mineral lands the mineral estate could not be disposed of except by lease.[1]

Congress was chary, however, of interfering too much in the internal affairs of the new State of Alaska. It declined to set any conditions on the state leasing system. Those that it considered it rejected. Instead, it expressly decided that "[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct." This is exactly how the system operated for nearly 30 years until the opinion below was handed down. Now, however, with one fell swoop, the state legislature finds itself compelled to enact a leasing system with rents and royalties because the court below found that certain federal leases and the Mineral Leasing Act of 1920 require rents or royalties.

Contrary to considerable federal precedent, the court ruled that the Legislature's existing system of encouraging mineral development with a $200 per year work requirement or rental was not a rental. It further found that the existing mineral license tax, which operates much like a royalty for all mineral development in the state, *see* Alaska Stat. § 43.65.010, did not satisfy the so-called royalty requirement in leases. Finally, the court below did not even address whether Section 6(i)'s reference to "such lands" that must be leased referred to all mineral lands

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[1] The issue of whether or not Congress actually has the power to dictate how a state may manage its own property was raised by Fairbanks in the Superior Court below where it was argued that the Tenth Amendment to the United States Constitution placed limits on such power. However, in the wake of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this argument was not pursued.

or only those lands where the surface estate has been disposed of previously. Thus misinterpretation and confusion abound.

In short, contrary to the Statehood Act the state Supreme Court, rather than the state legislature, has become the final arbiter on what the state's mineral leasing system should look like. The court mistakenly ignored Section 6(i)'s directive that the Legislature shall determine the scope of the leasing system, and instead reasoned that it is compelled by unrelated, irrelevant federal law to impose a new system of rents or royalties.

———o———

CONCLUSION

The court below ignored relevant federal law by granting Trustees a private right of action and standing. Worse, the court below found the state legislature's ability to manage state mineral lands to be circumscribed by unrelated, irrelevant federal law. Both errors are in direct contradiction to Congress' intent and express language in the Alaska Statehood Act. This Court should grant the petitions for writ of certiorari in this case in order to restore balance to the basic federal relationship between the state and federal governments.

DATED: August, 1987.

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No. 87-205

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OCTOBER TERM, 1987

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Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

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OCTOBER TERM, 1987

ALASKA MINERS ASSOCIATION,

Petitioner,

STATE OF ALASKA, et al.,

Petitioners,

and

TRUSTEES FOR ALASKA, et al.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

PETITIONER ALASKA MINERS ASSOCIATION REPLY MEMORANDUM

The Alaska Miners Association demonstrated in its opening brief that review of this case is warranted for three independent reasons: (1) State courts

need a uniform rule for determining when a private action in state court may be entertained to enforce a federal statute in which Congress has not authorized a private action in federal court; (2) State courts need a uniform federal rule to determine when concurrent state court jurisdiction for enforcement of a federal statute is incompatible with federal interests such that the matter should be left to the exclusive jurisdiction of federal courts; and (3) Review of the merits is necessary because the decision interpreting Section 6(i) of The Alaska Statehood Act has a substantial effect on Alaska's management of its mineral wealth as well as on other courts' interpretation of provisions in the School Lands Act and other statehood acts which are similar to Section 6(i).

Respondents have opposed the petition for certiorari by asserting that the Alaska Supreme Court properly determined: (1) that it had concurrent jurisdiction to hear cases regarding the proper interpretation of Section 6(i) (Respondent's Brief in Opposition (Resp. B.) at 12), and (2) that the State of Alaska is violating Section 6(i) by not charging rent and royalties for the production of minerals from state mineral lands. Resp. B. at 26.

This Reply Brief is limited to responding to the private cause of action arguments raised in Part A of Respondent's Brief in Opposition. Part B of the Respondent's Brief focuses on the merits of the Alaska Supreme Court decision. A question on the merits is not at issue in a petition for certiorari. Therefore, the

Alaska Miners Association does not address the merits in this Reply Brief.[1]

The Respondent's Brief confuses the issues of concurrent jurisdiction and private right of action. While the Alaska Miners Association agrees that no general bar to concurrent state court jurisdiction exists to decide issues involving The Alaska Statehood Act, it does not agree that a private right of action exists to enforce Section 6(i) or that the state court has concurrent jurisdiction to hear such an action. The last sentence of section 6(i) explicitly defines the enforcing party, court and remedy:

> [A]ny lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings

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[1] The importance of the issues decided by the Alaska Supreme Court, however, provides an independent reason for review of the case. See Alaska Miners Association Petition for Certiorari at 12-13.

> instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

Section 6(i) of The Alaska Statehood Act, 72 Stat. 339 (1958) (as amended) (set out in a note preceding 48 U.S.C. §21 (1982)).

In its petition for certiorari, the Alaska Miners Association contends that certiorari should be granted to determine how, in the face of such explicit language, state courts should decide whether a private action in state court may be entertained. Respondents incorrectly assert that the private right of action doctrine is predicated on the [federal] courts' limited jurisdiction under the federal constitution. Resp. B. at 16, n. 7. Because state courts are courts of general jurisdiction, Respondents contend that the private right of action doctrine has no place in state court. Resp. B. at 17. However, as

Justice Rehnquist explained in his concurrence in Cannon v. University of Chicago, 441 U.S. 677 (1979),

> [t]he question of the existence of a private right of action is basically one of statutory construction. And while state courts of general jurisdiction still enforcing the common law as well as statutory law may be less constrained than our federal courts enforcing laws enacted by Congress, the latter must surely look to those law to determine whether there was any intent to create a private right of action under them. (references omitted).

Id. at 717-718. Further, in Davis v. Passman, 442 U.S. 228 (1978), this Court explained that

> [s]tatutory rights and obligations are established by Congress and it is entirely appropriate for Congress, in creating those rights and obligation, to determine in addition, who may enforce them and in what manner.

Id. at 241. In this case, Congress determined the U.S. Attorney General is the party who is empowered to enforce

Section 6(i), and that he may do so (if at all) by suing in the United States District Court for the District of Alaska. Nonetheless, the Alaska Supreme Court has implied a private right of action in state court.

This Court has recently discussed why, in the absence of legislative intent or directive to the contrary, private litigants are not entitled to arrogate unto themselves the federal government's exclusive enforcement prerogatives by means of private actions. In Heckler v. Chaney, 470 U.S. 821 (1985) this Court explained,

> [t]he reasons for this general unsuitability [of judicial review of agency decisions to refuse enforcement] are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but

> whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested the best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. at 831. This important policy consideration is applicable to private causes of actions brought in state court to interpret federal statues.[2] The Alaska Supreme Court ignored this vital federal concern in making its determination that a

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[2] This rationale has been applied specifically with respect to public land grants made subject to conditions enforceable to the exercise of powers reserved in the sovereign grantor. See e.g., Downer v. Graham, 21 F.2d 732 (10th Cir. 1927) (suit upon alleged violation of a condition upon the disposition of New Mexico statehood lands may only be maintained by U.S. Attorney General).

private right of action exists under Section 6(i).

The Alaska Court's refusal to apply the private right of action doctrine has resulted in allowing individuals who otherwise could not bring action in federal court to bring an action in state court to enforce a federal statute. The effect is to divert the delicate responsibility of interpreting federal statutes and regulations from federal courts to state courts. Such an outcome cannot have been within the contemplation of Congress when its legislative enactment explicitly names the enforcing party, court and remedy.

As Chief Justice Rehnquist concluded in his concurrence in Cannon, 414 U.S. at 718, "this Court . . . should be extremely reluctant to imply a cause of action absent such specificity on the part of the

Legislative Branch." State courts need guidelines for determining when a private right of action can be implied in state court.

For the reasons addressed in its petition for certiorari, the Alaska Miners Association respectfully requests that its petition be granted.

Dated this 26th day of October, 1987

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(4) (5) (3)

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In the Supreme Court of the United States

OCTOBER TERM, 1987

ALASKA MINERS ASSOCIATION, PETITIONER

v.

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v.

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TRUSTEES FOR ALASKA, ET AL., CROSS-PETITIONERS

v.

STATE OF ALASKA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Section 6(i) of the Alaska Statehood Act provides that mineral interests in lands selected by the State of Alaska pursuant to Section 6(a) or (b) of that Act may be disposed of only by "lease," and that any lands or minerals disposed of in violation of Section 6(i) shall be forfeited to the United States in a suit brought by the Attorney General of the United States in the United States District Court for the District of Alaska.

The United States will address the following questions:

1. Whether respondents have the standing necessary to permit this Court to exercise jurisdiction under Article III of the Constitution.

2. Whether private parties such as respondents are barred by Section 6(i) from bringing an action in state court seeking a declaratory judgment that the State's mining laws governing the disposition of mineral interests in selected lands do not comply with Section 6(i).

3. Whether Alaska's mining laws violate the restriction in Section 6(i) of the Alaska Statehood Act that minerals may be disposed of only by a "lease" because they permit a person to extract "hard rock" minerals under a location system, similar to that established by the federal Mining Act of 1872, without payment of rents or royalties to the State.

4. Whether the restriction in Section 6(i) of the Alaska Statehood Act that permits minerals in lands selected by the State under that Act to be disposed of only by lease is limited to those lands that were known to be mineral in character at the time they were selected by the State from the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-205

ALASKA MINERS ASSOCIATION, PETITIONER

v.

TRUSTEES FOR ALASKA, ET AL.

No. 87-206

STATE OF ALASKA, PETITIONER

v.

TRUSTEES FOR ALASKA, ET AL.

No. 87-371

TRUSTEES FOR ALASKA, ET AL., CROSS-PETITIONERS

v.

STATE OF ALASKA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

A. *The Statutory Framework*

Sections 6(a) and (b) of the Alaska Statehood Act authorized Alaska to select 103,350,000 acres of land from the vacant, un-

appropriated and unreserved public lands of the United States. 72 Stat. 340. The "primary purpose" of this grant "was to ensure the economic and social well-being of the new state" (86-206 Pet. App. B51 [hereinafter Pet. App.], citing *Udall* v. *Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969); *United States* v. *Atlantic Richfield Co.*, 435 F. Supp. 1009, 1016, 1021 n.47 (D. Alaska 1977), aff'd, 612 F.2d 1132 (9th Cir.), cert. denied, 449 U.S. 888 (1980)). This case concerns the validity of the statutory scheme by which Alaska permits the extraction of so-called "hard-rock" minerals from lands selected pursuant to Section 6(a) or (b).

1. a. Both the Alaska Statehood Act and the state statutory scheme were enacted against the background of the distinction that then existed (and still exists) under federal law between the system of mineral *location* under the Mining Act of 1872, ch. 152, 17 Stat. 91, 30 U.S.C. 22 *et seq.*, and the system of mineral *leasing* under the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U.S.C. (& Supp. III) 181 *et seq.* Under the Mining Act of 1872, " '[d]iscovery' of a mineral deposit, followed by the minimal procedures required to formally 'locate' the deposit, gives an individual the right of exclusive possession of the land for mining purposes, 30 U.S.C. § 26; as long as $100 of assessment work is performed annually, the individual may continue to extract and sell minerals from the claim without paying any royalty to the United States, 30 U.S.C. § 28." *United States* v. *Locke*, 471 U.S. 84, 86 (1985). The 1872 Act also authorizes the claimant to obtain a patent by paying a nominal sum to the United States. 30 U.S.C. 29, 37; *Locke*, 471 U.S. at 86. By contrast, under the Mineral Lands Leasing Act of 1920, a person seeking to extract minerals from federal land may only lease the land, and he must pay an annual rental fee and royalties on any minerals extracted. 30 U.S.C. (& Supp. III) 207(a), 212, 226(b) and (d), 241(a), 262, 283. The location system under the 1872 Act applies to so-called "hard rock" minerals, such as gold, silver, copper, lead, zinc, tin and tungsten, while the leasing system under the 1920 Act applies to coal, oil, gas, oil shale, phosphate, sodium and potassium. 30 U.S.C. 181.

The Alaska Statehood Act and the state statutory scheme also were enacted against the background of provisions in other statehood acts that granted lands for school purposes. See *Papasan* v. *Allain*, No. 85-499 (July 1, 1986), slip op. 1-4. Under those other acts, this Court held that lands that were known to be mineral in character at the time of statehood were excluded from the school grants unless Congress expresssly provided otherwise. *United States* v. *Sweet*, 245 U.S. 563 (1918); *Wyoming* v. *United States*, 255 U.S. 489, 500-501 (1921). In response, Congress passed the Act of January 25, 1927, ch. 57, § 1, 44 Stat. 1026-1027, 43 U.S.C. 870, which extended the school grants to embrace numbered sections that are mineral in character. *Andrus* v. *Utah*, 446 U.S. 500, 509 (1980). The 1927 Act further provided that the mineral rights in such lands must be retained by the State and "shall be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools" (43 U.S.C. 870(b)).

Section 6(i) of the Alaska Statehood Act (72 Stat. 342) makes applicable to the lands granted to Alaska a set of restrictions that are expressly patterned after those in the 1927 School Lands Act. See Pet. App. B30-B32, B39-B46; *State* v. *Lewis*, 559 P.2d 630, 636 (Alaska), appeal dismissed, 432 U.S. 901 (1977). Section 6(i) provides:

> All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate pro-

> ceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

The only distinction between Section 6(i) and the 1927 Act is that Section 6(i) does not require that "the proceeds and rentals and royalties" of mineral leasing be utilized only for school purposes, since the basic grants under Section 6(a) and (b) of the Alaska Statehood Act are not limited to school purposes.

b. The requirement that minerals on selected lands be disposed of only under a "lease" encountered substantial opposition from mining interests and others in Alaska when the question of statehood for Alaska was under consideration by Congress in the mid-1950s. This opposition is reflected in the text and background of the Alaska Constitution, which was proposed by a Convention in 1956 and approved by the people of Alaska later that year. See *Lewis*, 559 P.2d at 636. The basic restrictions of the 1927 School Lands Act had already been incorporated into the pending Alaska statehood bill when the Convention convened. Pet. App. C10; V. Fischer, *Alaska's Constitutional Convention* 134 (1975). As the Alaska Supreme Court explained, those restrictions "were controversial because they signalled a change from the existing location-patent system to a leasing system" for hard-rock minerals (Pet. App. B46). As a result, the Alaska Constitution, as approved by the voters in 1956 and still in effect, retains the distinction between mineral leasing and mineral location. Article VIII, § 12 states that the Legislature "shall provide for the issuance, types and terms of leases" for oil, gas, coal and other minerals that were then subject to the Mineral Lands Leasing Act of 1920 or the Alaska Coal Leasing Act of 1914, ch. 330, 38 Stat. 741. But Article VIII, § 11 provides that "[d]iscovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this Constitution by the people of Alaska, were subject to location under the federal mining laws."[1]

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[1] Section 11 further provides that continuation of rights in those minerals "shall depend upon the performance of annual labor, or the payment of fees,

The Alaska Supreme Court explained that Art. VIII, § 11 was included by the Convention at the instance of delegates who favored a location-patent system for hard-rock minerals, in the hope that Congress might recede from the universal leasing requirement in the pending bill (Pet. App. B49). " 'Most [delegates] also saw the provision as a demonstration to miners * * * that any restrictions applicable to alienation of mineral lands were being imposed from outside and were not the convention's own doing' " (*ibid.* (quoting V. Fischer, *supra*, at 134)). But because the benefits of statehood were thought to outweigh the disadvantages of the "lease" requirement, the Constitution proposed by the Convention and approved by the voters in 1956 expressly consented in advance to such terms or conditions as Congress might attach to the grant of federal lands to Alaska (Art. XII, § 13; see Pet. App. B46-B47 & n.22).

Congress did not recede from the universal "lease" requirement when it enacted Section 6(i) of the Statehood Act in 1958. However, in light of the opposition to that requirement in Alaska,[2] Congress provided in Section 8(b) of the Statehood Act that Alaska's admission to the Union was conditioned upon the voters' consent at a special election to all provisions of the Statehood Act "reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska" (72 Stat. 344). Section 8(b) further provided that if the voters approved this proposition, the Constitution of Alaska "shall be

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rents, or royalties, or upon other requirements as may be prescribed by law," and that "[d]iscovery and appropriation [of such minerals] shall initiate a right * * * to patent of mineral lands if authorized by the State and not prohibited by Congress."

[2] After the proposed Constitution was approved by the people of Alaska in 1956, petitioner Alaska Miners Association (AMA) urged Congress to recede from the mandatory mineral leasing provision now embodied in Section 6(i) and instead to permit the State to implement the mineral location system contemplated by Art. VIII, § 11 of the proposed Constitution for minerals that were subject to location under the federal mining laws. See *Statehood for Alaska: Hearings on H.R. 50, et al. Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 85th Cong., 1st Sess. 217-245 (1957).

deemed amended accordingly" (*ibid.*). The people of Alaska voted in favor of the proposition at a special election on August 26, 1958 (559 P.2d at 639), and Alaska was admitted to the Union on January 3, 1959.

2. In the early years of statehood, state officials did not interpret the "lease" requirement in Section 6(i) to apply to *all* lands selected by the State pursuant to Section 6(a) and (b) of the Statehood Act. Rather, they interpreted it to apply only where the surface estate was sold or otherwise disposed of by the State, with a reservation of mineral interests to the State. Under that construction, Section 6(i) did not restrict the manner in which the State disposed of minerals in those selected lands (presumably the vast majority) that were retained by the State, and the State therefore was free to apply a mineral location system to such lands. See *Status of Mining Claims Staked on State Selected Lands,* 1981 Alas. Att'y Gen. Op. 113, 154-155 (1981) [hereinafter 1981 Alas. Att'y Gen. Op.].

The State's narrow construction of Section 6(i), and the distinction embodied in the Alaska Constitution between mineral leasing and mineral location, were implemented in a law enacted by the Alaska Legislature in 1959 to govern the administration of lands owned by the new State. 1959 Sess. Laws of Alaska (SLA) 229-247. The 1959 legislation provided for the leasing of state lands and the payment of rents and royalties for the extraction of coal, oil, gas and other minerals that are governed by the Mineral Lands Leasing Act of 1920. Art. VIII, § 3, 1959 SLA at 241-244; see Alaska Stat. §§ 38.05.135-38.05.184 (1984). But "all minerals [that were] subject to location under the mining laws of the United States" were made subject to discovery, appropriation and location under the relevant sections of Alaska's mining laws, which in turn had been derived directly from the federal mineral location laws. Art. IX, § 1, 1959 SLA at 246.[3] The only difference was that a claimant under the State's location system could not receive a patent to

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[3] The laws of the United States relating to mining claims were extended to the Territory of Alaska by Section 26 of the Act of June 6, 1900, ch. 786, 31 Stat. 329, 30 U.S.C. 49a. The State's mining laws are now codified at Alaska Stat. §§ 38.05.185-38.05.275 (1984).

the mineral interests. However, as required even by the State's narrow construction of Section 6(i), minerals that were reserved to the State when the surface estate in selected land was sold by the State could be extracted only under a lease, on terms approved by the Commissioner of the Department of Natural Resources. Art. IX, 1959 SLA at 246.

3. a. Section 6(i) became the subject of considerable interest in Alaska at the beginning of this decade, when the Attorney General of Alaska undertook an extensive analysis of the scope of Section 6(i) for the Commissioner of Alaska's Department of Natural Resources. 1981 Alas. Att'y Gen. Op., *supra*. In his final opinion, rendered in 1981, the Attorney General concluded, inter alia, that state officials had erred in interpreting the "lease" requirement in Section 6(i) to apply only to mineral interests that were reserved to the State when the surface estate was sold (*id.* at 156-157). In his view, the "overwhelming weight" of the legislative history established that "the leasing restriction [in Section 6(i)] was to apply to all mineral lands" (*ibid.*), while "[t]he approach offered by state officials was not contemplated by anyone prior to passage of the Statehood Act" (*id.* at 157).[4] However, reversing the position he had taken in a publicly circulated draft of the opinion (*id.* at 158), the Attorney General further concluded that Section 6(i) applies only to lands that were known to be mineral in character at the time they were selected by the State (*id.* at 157-166).

b. In response to the Attorney General's opinion, the State Legislature revised the State's mining laws in 1981. 1981 SLA ch. 108. The 1981 amendments provide that hard-rock minerals must be extracted under a lease, even on lands retained by the State. However, this special leasing requirement for hard-rock minerals applies only if the Commissioner first finds that the lands in question were known to be mineral in character at the time they were selected by the State. That finding can be made only through the issuance of a formal land classification order (Alaska Stat. §§ 38.05.185, 38.05.205), and we have been in-

[4] We believe that the Attorney General's interpretation of Section 6(i) in this respect is clearly correct, and petitioners do not challenge it here.

formed by the Office of the Attorney General of Alaska that no such classification orders have been issued. As a result, even on lands that were known to be mineral in character at the time they were selected, hard-rock minerals continue to be governed solely by the State's mineral *location* system, which does not provide for the payment of rents or royalties to the State.[5]

Moreover, the special hard-rock leasing provisions (unlike the State's general mineral leasing laws applicable to oil, gas and coal) do not provide for the payment of royalties to the State for the extraction of minerals. And although the special leasing provisions do prescribe an annual rental fee, that fee is set at the amount of annual labor necessary to maintain a mining location claim (now $200 per year, Alaska Stat. § 38.05.210(a)), and the lessee is entitled to a credit against his rent for the labor actually performed (§ 38.05.205(b)). The net effect of these provisions is that even if the Commissioner should trigger application of the special hard-rock leasing provisions in the future, the State still would not realize any cash rents or royalties for the leasing or extraction of hard-rock minerals from those lands.

c. In 1982, the Alaska Legislature again amended the State's hard-rock mining laws in response to the Attorney General's 1981 opinion. As explained by the Attorney General in a June 3, 1982 opinion letter to Governor Jay S. Hammond,[6] the 1982 amendments responded to the concern that the State's mineral location system does not satisfy the "lease" requirement in Section 6(i) because it does not provide for particularized review by the State of individual mining claims and does not contain a mechanism by which the State conveys a mining right or other interest to each claimant. The Attorney General observed that although the granting of rights in a special tract "may not be a necessary element of a leasing system, it could be the deciding

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[5] State law also provides for the mining of hard-rock minerals under a lease if the Commissioner determines that the mining would conflict with potential uses of state land (Alaska Stat. § 38.05.185). This provision is not addressed to Section 6(i), and we have been informed by the Office of the Attorney General of Alaska that the only mining leases issued under Section 38.05.205 have been premised on a finding of conflicting uses.

[6] We have lodged a copy of this opinion letter, which was furnished to us by the Office of the Attorney General of Alaska, with the Clerk of this Court.

factor in a judicial determination of whether Alaska's location system is really a leasing system" (Letter at 3). The 1982 amendments authorize the Commissioner to issue a "production license" to each locator of a mining claim who wishes to extract hard-rock minerals. Alaska Stat. § 38.05.205. Although a production license likewise is not conditioned upon payment of rents or royalties, the Attorney General was of the view that the 1982 amendments brought the State into compliance with the Statehood Act because a production license could be regarded as a "lease" for purposes of Section 6(i). Letter at 3-4. The Attorney General acknowledged that it would be better if the license were expressly termed a "lease," but he explained that "this additional cosmetic change proved impossible due to the miners' adamant and vocal opposition to the term" (*id.* at 3).

B. ***The Proceedings In This Case***

1. This suit was filed in state Superior Court in 1983 by the respondent environmental organizations, Native village corporations, and fishing association. They sought a declaratory judgment that the state statutory scheme for the mining of hard-rock minerals on land selected pursuant to Section 6(a) or (b) of the Statehood Act violates the "lease" requirement in Section 6(i) because the State does not receive rents or royalties in return for production licenses or leases and because the State construes the "lease" requirement to apply only to lands that were known to be mineral in character when they were selected. Comp. ¶¶ 40-46, 57-59; Prayer for Relief ¶¶ 1-3, 7.[7]

The trial court granted summary judgment in favor of petitioners (Pet. App. A1-A15). The court first held that respondents do not have standing to seek judicial review (*id.* at A5-A9), because "[o]n the evidentiary record in this case, [respondents] have * * * failed to establish the requisite individualized harm, direct interest, or personal stake in the mineral resources being managed under the statutory scheme challenged here" (*id.* at A5-A6). The court also found that respondents do not have

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[7] Respondents raised certain claims under the State Constitution as well (Compl. ¶¶ 47-56, 60-62), but the Alaska Supreme Court did not reach the state-law claims (Pet. App. B85) and they are not at issue here.

standing under a distinct state-law doctrine that permits a citizen or taxpayer to challenge state governmental action (*id.* at A6-A9). On the merits, the trial court held that because Section 6(i) provides that minerals are "subject to lease by the State as the State legislature may direct," the Alaska Legislature had discretion to permit the consideration for a lease (or production license) to be in the form of "services" (the annual labor necessary to maintain a mining claim), rather than cash rents or royalties (Pet. App. A9-A12).

2. On respondent's appeal, the Supreme Court of Alaska reversed and remanded for entry of a declaratory judgment that the state statutory scheme violates Section 6(i) and for other appropriate proceedings (Pet. App. B1-B86). The Supreme Court noted that respondents "assert that they have standing as citizens or taxpayers, rather than because their interests are injured" (*id.* at B9), and it held that respondents have standing in the former capacity (*id.* at B6-B26). The court rejected the State's argument that respondents are not appropriate plaintiffs as citizens or taxpayers because the Attorney General of the United States has authority to challenge the State's hard-rock mining system in a forfeiture proceeding brought under Section 6(i) of the Statehood Act. The court reasoned that respondents "are interested in preserving to the state the economic value of these lands," while the Attorney General "would be bringing an action for forfeiture of these lands, contrary to [respondents'] interest" (*id.* at B25-B26). The court also rejected the State's related contention that the authorization in Section 6(i) for the Attorney General to bring a forfeiture action constitutes an implied, federal-law preclusion of this declaratory judgment action in state court (Pet. App. B26-B31). The court pointed out that there has been much litigation in the courts of other States concerning restrictions on federal land grants (*id.* at B26-B27 & n.11), and it did not read the forfeiture provision in Section 6(i) to require a different result for Alaska (*id.* at B29-B31 & n.13). Indeed, the court believed that "[i]t would be unusual in the extreme if a state court could not construe the meaning of its state's Statehood Act" (*id.* at B31).

On the merits, the Supreme Court found Alaska's hard-rock mining statutes to be substantively "indistinguishable" from a

mineral location system (Pet. App. B70-B71), and it held that the state statutes "do not meet the leasing requirement of section 6(i)" because Section 6(i) "mandates a system under which the state must receive rent or royalties for its mining leases" (*id.* at B66-B67). Based on its exhaustive review of the legislative history of Section 6(i) (see Pet. App. B33-B67), the court concluded that "Congress * * * granted Alaska the mineral estate with the intention that the revenue generated therefrom would help fund the new state's government" (*id.* at B56). In the court's view, "[t]he leasing restriction in section 6(i) was intended to further the goal of state revenue production" (*id.* at B58-B59), especially since Congress equated it with the leasing procedures under the Mineral Lands Leasing Act of 1920, which "reject[ed] the location system for certain minerals in order to provide revenue to the United States" (*id.* at B64-B65). The court also found it significant that the lease requirement in Section 6(i) was "copied advisedly" from the 1927 School Lands Act (*id.* at B59-B63), because the 1927 Act's leasing requirement "was expressly intended to be productive of proceeds, rents, and royalties" (*id.* at B64-B65) and because the laws of the States subject to the 1927 Act "are uniform in requiring the payment of rent, or royalties, or both" (*id.* at B65). Finally, the court rejected the contention that the performance of annual labor worth $200 satisfies the requirement of rents or royalties, since annual labor is required as evidence of good faith that the claim will be worked and "is not a source of revenue to the landowner" (*id.* at B70). The court did, however, agree with petitioners that the leasing requirement in Section 6(i) applies only to lands that were known to be mineral in character when they were selected by the State (*id.* at B71-B84).

3. After the petitions and conditional cross-petition for a writ of certiorari were filed in this Court, the Superior Court, on remand, issued an order and declaratory judgment dated November 9, 1987 (App., *infra*, 1a-8a). Because the Supreme Court's decision referred only to rents *or* royalties, the Superior Court rejected respondents' contention that the declaratory judgment should state that Alaska's statutory scheme must provide for payment of rents *and* royalties (*id.* at 3a-4a). The Superior Court also rejected respondents' contention that the

State must charge rents or royalties that reflect the "fair market value" of the hard-rock minerals in the land (*id.* at 4a). The court reasoned that Section 6(i) was intended to assure the State Legislature "substantial flexibility and discretion in fashioning some appropriate leasing system" (*ibid.*), and it read the Supreme Court's opinion to hold only that "the State has to charge *some* rents or royalties for extracted minerals, i.e., that the State was not free to impose *no* such charges on miners extracting minerals from state mineral lands" (*ibid.* (emphasis in original)). Finally, the Superior Court denied, as premature, respondents' request for an injunction barring the State from allowing extraction of mineral deposits from covered state lands after May 15, 1988 if the State Legislature did not enact a leasing system conforming to the Alaska Supreme Court's interpretation of Section 6(i) by that time (App., *infra*, 5a-6a).

DISCUSSION

Respondents do not satisfy the standing requirements of Article III of the Constitution, and this Court therefore does not have jurisdiction to entertain the petitions or cross-petition for a writ of certiorari. In any event, the issues raised by petitioners do not warrant review. The Supreme Court of Alaska correctly held that the courts of that State are not precluded by Section 6(i) of the Alaska Statehood Act from entertaining an action seeking a declaratory judgment regarding the validity of the State's hard-rock mining laws under Section 6(i). The courts of a number of other States have entertained similar suits, and a declaratory judgment action does not conflict with the Attorney General's distinct authority under Section 6(i) to bring an action for forfeiture of lands or minerals that are disposed of in violation of that Section. On the merits, the Alaska Supreme Court reasonably characterized the State's hard-rock mining laws as essentially a mineral location rather than a mineral leasing scheme, reasonably construed the "lease" provision in Section 6(i) to require the payment of at least some rents or royalties for the extraction of minerals, and reasonably concluded that the State's mining laws fail to satisfy that requirement because Alaska (unlike other western States) does not receive any cash payments for the extraction of hard-rock minerals. This unani-

mous holding that the State's own mining laws are inconsistent with the Alaska Statehood Act presents no issue warranting review by this Court.

By contrast, we find considerable merit in respondents' contention in their cross-petition that the Alaska Supreme Court erred in limiting the "lease" requirement in Section 6(i) to lands that were known to be mineral in character when they were selected by the State. However, because respondents request this Court to grant their cross-petition only if it grants the principal petitions, and because we believe that those petitions should be denied, the cross-petition should be denied as well.

1. Before addressing the questions presented in the petitions and cross-petition, we shall first address an important threshold question not raised by the parties: whether respondents have the Article III standing necessary to permit this Court to review the decision of the Alaska Supreme Court.[8] The "core component" of standing under Article III is that the plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). In our view, respondents face obstacles under all aspects of this test.

The Superior Court found that respondents "have * * * failed to establish the requisite individualized harm, direct interest, or personal stake in the mineral resources being managed under the statutory scheme challenged here" (Pet. App. A5-A6). Respondents did not challenge that finding, and the Alaska

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[8] The holding below that respondents' declaratory judgment action is not barred by Section 6(i) and that Alaska's existing hard-rock mining laws are inconsistent with Section 6(i) would appear to be sufficiently "final" for purposes of this Court's review under 28 U.S.C. 1257, even though the Supreme Court remanded for the Superior Court to enter the declaratory judgment and that judgment on remand addressed several additional issues regarding the meaning of Section 6(i) that might be relevant to the validity of future amendments to the State's mining laws. Our only reservation on the finality issue arises from the fact that neither court below has yet addressed the availability of injunctive relief, which could raise additional federal issues under Section 6(i). See note 18, *supra*.

Supreme Court did not overturn it. In fact, the Supreme Court acknowledged that respondents "assert that they have standing as citizens or taxpayers, rather than because their interests are injured" (*id.* at B9).[9] Moreover, in holding that respondents have standing as citizens and taxpayers (*id.* at B8-B26), the Alaska Supreme Court did not rely upon the possibility that Alaska's hard-rock mining laws might have a financial impact on the taxpayers who are members or constituents of the respondent organizations. Rather, it appears that under the special standing doctrine applied by the Supreme Court, the mere status of an individual as a citizen or taxpayer is sufficient to give him a derivative interest or stake in significant legal issues concerning the performance of state governmental functions. Althought the courts of the States are not barred by the Federal Constitution from recognizing standing on such a theory, this Court has consistently held that an individual does not satisfy the standing requirements of Article III based on nothing more than his status as a citizen who is interested in the conduct of his government. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 215-221 (1974); *United States* v. *Richardson*, 418 U.S. 166, 171-175 (1974); *Doremus* v. *Board of Education*, 342 U.S. 429, 433-435 (1952); *Frothingham* v.

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[9] The standing portions of respondents' brief (at 25-31) and reply brief (at 2-11) in the Alaska Supreme Court discussed only the taxpayer-citizen doctrine recognized by the Alaska Supreme Court in *State* v. *Lewis*, *supra*, and related cases. The briefs did assert that respondents had a "personal stake" in the outcome. But those assertions were made in the framework of the taxpayer-citizen standing doctrine under state-law precedents, and the "personal stake" that respondents alleged was entirely derivative of what respondents alleged to be the *State's* interest in realizing income from rental fees and royalties and avoiding the possible forfeiture of the land. See Appellants' Br. 25-26, 27; Reply Br. 2-3, 5 That stake is not "personal" in the sense of being unique to respondents; it is the interest shared by all taxpayers and citizens of Alaska in having their state government retain its assets and maximize its income from those assets.

Respondents also alleged in the Superior Court that their members or residents used state lands for recreational, commercial and subsistence purposes; that mining adversely affected those uses; and that placer mining polluted streams used by respondents' members and residents. Compl. ¶¶ 1-12. Neither the Superior Court nor the Alaska Supreme Court referred to those allegations of injury, and respondents did not rely on them in their briefs in the Alaska Supreme Court.

Mellon, 262 U.S. 447 (1923); cf. *Allen* v. *Wright*, 468 U.S. at 754-755, 756 n.21; *Valley Forge*, 454 U.S. at 482, 489-490 n.26.

Nor have respondents alleged that the State has spent tax revenues pursuant to a statute in direct contravention of a specific constitutional (or statutory) provision, such as the Establishment Clause, that restricts such expenditures. Compare *Flast* v. *Cohen*, 392 U.S. 83, 102-103 (1968); see *Valley Forge*, 454 U.S. at 479-480; *United States* v. *Richardson*, 418 U.S. at 175. In fact, respondents do not challenge the lawfulness of any taxes or expenditures as such. They merely object to the failure of the State to collect additional, non-tax revenues from other persons. If that theory of standing were adopted, any taxpayer could challenge any actions that have monetary consequences for the government.

Under Article III, "[t]he injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision" (*Allen* v. *Wright*, 468 U.S. at 751, quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)). In this case, respondents neither alleged in their complaint nor argued in the Alaska Supreme Court that there was a direct correlation between the amount of income the State receives from hard-rock mining on state lands and the amount of money that respondents' members and residents pay in state taxes. Compare *Allen* v. *Wright*, 468 U.S. at 758. Respondents accordingly do not deny that if the State in the past had received the increased mining revenues that respondents seek to compel in this suit, it is possible that the State Legislature would not have amended the State's tax code but instead would have used the increased revenues to furnish additional services, reduce a budget deficit, or increase a budget surplus. Any "injury" respondents' members and residents suffer as a result of the current rates of taxation therefore is not fairly traceable to the challenged action of the State in failing to charge rents and royalties. See *United States* v. *Richardson*, 418 U.S. at 171-172; *Flast* v. *Cohen*, 392 U.S. at 92-93; *Frothingham* v. *Mellon*, 262 U.S. at 487-488; see also *Winpisinger* v. *Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980). Nor would respondents necessarily receive relief from that

"injury" as a result of a decision in their favor in this case. To the contrary, respondents seek an injunction barring all hard-rock mining on state lands under the existing state statutes—relief that obviously would not generate additional revenues. Moreover, even if this suit should cause the State Legislature to amend the state statutes to impose rents and/or royalties in the future, many persons holding mining claims might forgo mining rather than make the payments. Compare *Allen* v. *Wright*, 468 U.S. at 758-759; *Eastern Kentucky Welfare*, 426 U.S. at 40-46. And even if some claimants did continue to mine, the increased revenues might not lead to lower taxes.

In sum, the decision of the Supreme Court of Alaska in this case was, for federal jurisdictional purposes, essentially an advisory opinion. That opinion might provide useful guidance to the Alaska Legislature as it seeks to conform its hard-rock mining laws to Section 6(i) of the Alaska Statehood Act, just as the 1981 Opinion of the Attorney General of Alaska led the Alaska Legislature to amend the State's hard-rock mining laws in 1981 and 1982 (see pages 7-9, *supra*). But the opinion is not subject to review here. This Court held in *Doremus* (342 U.S. at 434):

> We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

See also *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804 (1985); *Secretary of State of Maryland* v. *J.H. Munson Co.*, 467 U.S. 947, 954 & n.4 (1984); *Revere* v. *Massachusetts General Hosp.*, 463 U.S. 239, 243 (1983). We therefore suggest that the Court deny certiorari because of this jurisdictional defect, as well as for the other reasons set forth below. If the Court denies review, then in any future suit in federal court—including a forfeiture action brought by the Attorney General of the United States—both petitioners and respondents presumably would be

free to relitigate the issues of federal law that were addressed by the Alaska Supreme Court in this case, since the district court in any such suit could not accept a proceeding in state court that did not constitute a case or controversy "as the basis for conclusive disposition of an issue of federal law" (*Doremus*, 342 U.S. at 434). See P. Bator, *et al., Hart & Wechsler's The Federal Courts and the Federal System* 128-129 (1973); cf. *Fidelity Nat'l Bank & Trust Co.* v. *Swope*, 274 U.S. 123, 130-131 (1927).[10]

2. Petitioners' principal contention in this Court is that the state courts should not have entertained this suit, because respondents do not have an "implied right to action" under the Alaska Statehood Act to enforce the "lease" requirement of Section 6(i) and because the authorization for the Attorney General of the United States to bring a forfeiture action implicitly forecloses all private suits arising under Section 6(i). 87-206 Pet. 20-33; 87-205 Pet. 6-9. Both arguments fail.

a. We may assume for present purposes that, under the approach followed by this Court in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), and its progeny (see, *e.g., Thompson* v. *Thompson*, No. 86-964 (Jan. 12, 1988), slip op. 4-5), respondents do not have an implied private right of action under Section 6(i) that could be brought in federal district court under the general grant of federal question jurisdiction, 28 U.S.C. 1331. See Pet. App. A8-A9. Thus, we may assume that Section 6(i) was not enacted

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[10] It has been suggested that the language in *Doremus* quoted in the text could be read to mean that dismissal of the petition or appeal is appropriate only if the state supreme court *rejected* the federal constitutional challenge in a proceeding in which the plaintiff did not satisfy Article III's standing requirements, and that this Court properly could vacate a state court decision that *sustained* the federal constitutional challenge in such a proceeding. See *Barnes* v. *Kline*, 759 F.2d 21, 63 n.16 (D.C. Cir. 1984) (Bork, J., dissenting), vacated as moot, No. 85-781 (Jan. 14, 1987); L. Tribe, *American Constitutional Law* 114 n.20 (2d ed. 1988). We disagree. In our view, the *Doremus* passage makes clear that a federal court will not give preclusive effect to the unreviewed state court decision in a *future* case, not that this Court could vacate the state court decision on direct review in the *same* case, despite the absence of a case or controversy. The latter suggestion would have been inconsistent with the Court's explicit disclaimer of any suggestion that a state court is barred from rendering an advisory opinion on a federal constitutional question where Article III standing is lacking. 342 U.S. at 434.

for the special benefit of respondents or their members and residents, that the indicia of legislative intent do not reveal an affirmative congressional purpose to provide a private right of action under federal law, that a federal cause of action would not further the purposes underlying Section 6(i), and that respondents' cause of action is typically relegated to state law. Compare *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson*, No. 85-619 (July 7, 1986), slip op. 6-7. But the absence of a right to sue directly under federal law in federal court does not suggest that the state courts erred in entertaining this suit.

The Alaska Supreme Court did not hold that respondents have an implied private cause of action, as a matter of *federal* law, directly under Section 6(i). In fact, the Alaska Supreme Court did not discuss this Court's implied-right-of-action cases. Nor, as the State concedes (87-206 Pet. 31), did respondents assert that federal law afirmatively granted them a cause of action in the Superior Court; instead, respondents relied on the authority of that court, as one of general jurisdiction (see Alaska Stat. § 22.10.020(a) (1982)), to grant relief to the citizens of Alaska who are injured by the State's violation of federal law. See Appellants' Alaska Sup. Ct. Br. 31-32[11]; Reply Br. 6-9. In other words, respondents argued (and the Alaska Supreme Court apparently agreed) that *state* law provided respondents with a cause of action to challenge the validity of the State's hard-rock mining laws and to seek a declaratory judgment regarding the meaning of Section 6(i).

Because the Alaska Supreme Court did not purport to find a right of action under federal law, petitioners' contention cannot be that that Court misapplied this Court's implied-right-of-action precedents. Rather, it is that the Alaska Supreme Court

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[11] Quoting *In re C.D.M.*, 627 P.2d 607, 610 (Alaska 1981) (emphasis in original):

> Where a court is one of general jurisdiction, such as the superior court in the case at bar, it has traditionally been regarded as having the power to hear all controversies which may be brought before a court within the legal bounds of rights or remedies, except insofar as has been expressly and unequivocally *denied* by the state's constitution or statutes.

Accord *Siggelkow* v. *State*, 731 P.2d 57, 61 (Alaska 1987). The Superior Court has broad authority to issue declaratory judgments. See Alaska Stat. § 22.10.020(b); *Jefferson* v. *Asplund*, 458 P.2d 995 (Alaska 1969).

should have applied *Cort* v. *Ash* and its progeny, and that had it done so, it would have found that respondents do not have a cause of action under Section 6(i). See 87-206 Pet. 27-31; 87-206 Reply Br. 4-14; 87-205 Pet. 7-9. However, *Cort* v. *Ash* and this Court's other implied-right-of-action cases over that last fifteen years, including those cited by petitioners, all involved the question whether a plaintiff could bring an action in *federal* court based on a violation of a federal statute.[12] Petitioners cite no authority (and we are aware of none) for the proposition that *Cort* v. *Ash* and its progeny also restrict the power of a state court to entertain a state-created cause of action that includes as an element the violation of a federal statute. In fact, *Merrell Dow* demonstrates otherwise.

The plaintiffs in *Merrell Dow* brought a state-law tort suit in state court, seeking damages based on the alleged mislabeling of a drug in violation of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. (& Supp. IV) 301 *et seq.* *Merrell Dow*, slip op. 1-2. The Court assumed that the FDCA did not grant the plaintiffs an implied cause of action that could be brought in federal court under 28 U.S.C. 1331 (slip op. 6-7), and the Court held that the plaintiffs' state-law cause of action likewise could not be removed to federal court merely because of the presence of a federal issue (the alleged violation of the FDCA) (*id.* at 1, 7, 10). However, the Court made clear that the plaintiffs *could* proceed with their suit in state court, even though they sought to recover damages based on a violation of the FDCA in circumstances where the FDCA itself did not provide an implied right of action for damages (*id.* at 11-12 & n.14; *id.* at 15

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[12] See, *e.g.*, *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Universities Research Ass'n, Inc.* v. *Coutu*, 450 U.S. 754 (1981); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981); *California* v. *Sierra Club*, 451 U.S. 287 (1981); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Jackson Transit Auth.* v. *Transit Union*, 457 U.S. 15 (1982); *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523 (1984); *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134 (1985); *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson*, *supra*; *Thompson* v. *Thompson*, *supra*.

(Brennan, J., dissenting)). See also *Thompson* v. *Thompson, supra* (no implied right of action in federal court to enforce full-faith-and-credit rules in custody disputes, although rules must be enforced in state court); *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166-167 (1969) (nonemployee's remedy for violation of Safety Appliance Act is state common-law tort suit, brought in state court and subject to state defenses and standards of causation); *Moore* v. *Chesapeake & O. Ry.*, 291 U.S. 205 (1934) (same); *Hart & Wechsler, supra,* at 488 ("federal law does not create the cause of action" under *Crane* and *Moore*). Accordingly, petitioners err in relying on this Court's decisions concerning the availability of an implied cause of action in federal court.[13]

b. The relevant question for present purposes therefore is not whether Congress has affirmatively granted respondents a right to sue directly under Section 6(i) of the Statehood Act, but whether Congress has affirmatively foreclosed the state courts from entertaining a state-created cause of action in which the interpretation of Section 6(i) is at issue—*i.e.*, whether the state cause of action is preempted by the Statehood Act. Compare *Moore,* 291 U.S. at 216 (proper question is whether federal statute "precludes" incorporation of federal safety standard into state law). In our view, the Alaska Supreme Court correctly held that Section 6(i) does not bar this declaratory judgment action in state court. See Pet. App. B26-B31.

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[13] For the same reason, Alaska also errs in relying on three appellate decisions finding no implied private right of action in federal court to enforce the provisions of two statehood Acts. See 87-206 Pet. 23-25, citing *Keaukaha-Panaewa Community Ass'n* v. *Hawaiian Homes Comm'n,* 588 F.2d 1216 (9th Cir. 1978), cert. denied, 444 U.S. 826 (1979); *Price* v. *Hawaii,* 764 F.2d 623, 631 (9th Cir. 1985), cert. denied, 474 U.S. 1055 (1986); *Downer* v. *Graham,* 21 F.2d 732 (8th Cir. 1927). In the first two of these cases, the Ninth Circuit applied the *Cort* v. *Ash* analysis. *Downer* arose prior to *Cort* v. *Ash*. Although language in *Downer* suggests that restrictions in the Arizona-New Mexico Enabling Act (ch. 310, 36 Stat. 557) could not be enforced in a suit brought by a private party against a state official, that Act could not be read to foreclose such a suit in state court: as Alaska points out (87-206 Pet. 26 n.7), Section 28 of that Act (36 Stat. 575), which was not mentioned in *Downer,* expressly preserves the power of the State or any of its citizens to enforce the Act. See pages 23-24, *infra.*

Preemption of state law of course " 'is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." ' " *Commonwealth Edison Co.* v. *Montana,* 453 U.S. 609, 634 (1981) (citations omitted); see also *Hillsborough County* v. *Automated Medical Laboratories, Inc.,* 471 U.S. 707, 715 (1985). A court should be especially reluctant to find preemption here. This is not a routine state-law damages action between private parties in a commercial or other context that is actively and pervasively regulated by federal law, such that entertaining a cause of action in state court might disarrange the federal regulatory scheme. This case, rather, involves the power of a State to confer on its citizens the right to invoke the jurisdiction of the state courts to sue the State itself, concerning the State's administration of vast expanses of land that were granted to it by Congress for the maintenance of the state government and the ultimate benefit of its citizens. Respondents' suit does not intrude upon any active and pervasive regulatory scheme of the Federal Government, which has no continuing jurisdiction over the more than 100,000,000 acres granted to the State; respondents seek merely to enforce certain requirements that were imposed directly on the State by the Statehood Act itself. It would be ironic indeed if the Statehood Act, whose very purpose was to accord sovereign status to the newly admitted State, were construed implicitly to withdraw from the State so central a sovereign prerogative as the power to permit its citizens to petition their government, through its courts,[14] for redress of grievances concerning an entire subject matter of such importance to the State and its people.[15]

Petitioners point to no evidence that Congress intended that extraordinary result. Moreover, the courts of a number of States have entertained suits by taxpayers and other alleging

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[14] Cf. *Bill Johnson's Restaurants, Inc.* v. *NLRB,* 461 U.S. 731, 741 (1983); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510 (1972).

[15] The Supreme Court of Alaska similarly observed that "[i]t would be unusal in the extreme if a state court could not construe the meaning of its state's Statehood Act" (Pet. App. B31).

that actions by state officials with respect to lands granted by a statehood act are inconsistent with the statehood act. See, *e.g.*, *Springfield Township* v. *Quick*, 63 U.S. (22 How.) 56 (1860) (plaintiff township's citizens were beneficiaries of school land grant); *Kadish* v. *Arizona State Land Dep't*, 747 P.2d 1183 (Ariz. 1987) (taxpayer plaintiffs); *Merkwan* v. *State by and through Janklow*, 375 N.W.2d 624 (S.D. 1985) (taxpayer); *Kanaly* v. *State by and through Janklow*, 368 N.W.2d 819 (S.D. 1985) (taxpayers and citizens); *County of Skamania* v. *State*, 102 Wash. 2d 127, 685 P.2d 576 (1984) (county beneficiary of school land grant); *Oklahoma Education Ass'n* v. *Nigh*, 642 P.2d 230 (Okla. 1982) (education association); *State ex rel. Hughes* v. *State Board of Land Commissioners*, 137 Mont. 510, 515-519, 521-523, 353 P.2d 331, 335-336, 338 (1960) (apparently a citizen); *Toomey* v. *State Board of Land Commissioners*, 106 Mont. 547, 559-563, 81 P.2d 407, 413-415 (1938) (taxpayer); *State ex rel. Ebke* v. *Board of Educational Land & Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951) (disappointed lease applicant); *Ross* v. *Trustees of University of Wyoming*, 30 Wyo. 433, 222 P. 3 (1924) (university that was beneficiary of school land grant).

Contrary to petitioners' contention (87-206 Pet. 19, 26-30), there is no reason to believe that Congress intended a different and unique rule in Alaska simply because Section 6(i) authorizes the Attorney General of the United States to bring an action for forfeiture of any lands or minerals that are disposed of contrary to Section 6(i). Petitioners cite no legislative history suggesting that this authorization was intended to preclude other litigation, in state court, concerning the meaning of Section 6(i).[16] It is, in

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[16] The potential breadth of petitioners' preclusion argument is unclear. For example, in a suit under a state equivalent of the Administrative Procedure Act (5 U.S.C. (& Supp. IV) 701 *et seq.*), a disappointed applicant might wish to challenge the state agency's award of a mining permit or lease to another applicant on the ground that it failed to comply with state standards as well as Section 6(i); could Congress have meant to foreclose the state court from considering the federal issue in the action for judicial review? If land was mistakenly conveyed to a private party without reservation of mineral interests to the State, would the Attorney General of Alaska be barred from bringing an action in state court to cancel the patent on the ground that it was void under Section 6(i)? Would the state courts be barred from entertaining a quiet title action between private parties where the issue of ownership turned on a construction of Section 6(i)?

fact, most unlikely that Congress intended to divest the state courts of their authority to guide the State in the performance of its trust responsibilities (cf. *United States* v. *Mason*, 412 U.S. 391, 399 (1973)) and instead to vest the Attorney General of the United States with the exclusive (and paternalistic) responsibility to oversee all aspects of the State's performance.

Nor does private litigation—and especially a declaratory judgment action—interfere with the Attorney General's enforcement authority under Section 6(i), any more than the opinions of the Attorney General of Alaska in 1981 and 1982 construing Section 6(i) interfered with that authority. Forfeiture under Section 6(i) obviously was intended as an ultimate sanction to protect the interests of the United States if the restrictions it imposed are violated; respondents, by contrast, seek to prevent a violation of those restrictions from occurring and thereby to avoid any occasion for forfeiture, so that the land may be preserved for the State and its citizens, as Congress intended (Pet. App. B25-B26). The Attorney General does not have the resources necessary to monitor the administration and disposition of the millions of acres of land that were granted to the States. Suits by private parties and beneficiaries of the trusts can furnish an important means for ensuring that the limitations imposed by Congress are respected. Compare *Cannon* v. *University of Chicago*, 441 U.S. at 687-688 n.8, 704-708 (discussing the relationship between private suits to enforce anti-discrimination provisions and fund-termination actions by federal agencies).[17]

In addition, in the Arizona-New Mexico Enabling Act, which was the last statehood act passed by Congress prior to the Alaska Statehood Act, Congress authorized the Attorney General to bring any action (not merely one seeking forfeiture) to enforce its provisions and expressly provided that nothing in the Act "shall be taken as in limitation of the power of the state

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[17] For similar reasons, there is no reason to believe that Congress would have wanted the federal courts to have exclusive jurisdiction over suits under Section 6(i). See 87-205 Pet. 10-11, citing *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981). As this case demonstrates, state courts are not inhospitable to federal claims under Section 6(i), and there is no distinct need for uniformity or for the expertise of federal judges. See 453 U.S. at 483-484.

or of any citizens thereof to enforce the provisions of this Act" (§ 28, 36 Stat. 575). This provision sanctions the availability of whatever remedies might be afforded outside the Enabling Act; it does not confer a right directly under that Act, as Alaska contends (87-206 Pet. 26 n.7). There is no reason to believe that Congress intended to treat the State and citizens of Alaska any differently, by foreclosing a right action that would otherwise be available in the courts of Alaska concerning lands granted by the Alaska Statehood Act.[18]

3. In addition to arguing that the state courts were without authority to entertain this suit, petitioners also contend (87-206 Pet. 33-38; 87-205 Pet. 12-13) that the Alaska Supreme Court erred in holding that the State's hard-rock mining laws do not satisfy the "lease" requirement in Section 6(i) because they do not provide for payment of cash rental fees or royalties to the State. In our view, however, the Alaska Supreme Court's unanimous ruling on this issue is correct, and indeed petitioners offer virtually no rebuttal to that Court's extensive analysis. For this reason, and because the ruling below does not conflict with the decision of any other state or federal court, review on this issue is not warranted.

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[18] The State relies (87-206 Pet. 21-22) on a passage in *Mills County* v. *Railroad Cos.*, 107 U.S. 557 (1883), that discussed the requirement in the Swamplands Act that the proceeds of the States' sales be used for reclamation of such lands; the Court stated that whether that condition was faithfully performed was "a question between the United States and the States, and is neither a trust following the lands, nor a duty which private parties can enforce as against the State" (107 U.S. at 566). *Mills County* did not purport to lay down a general rule that all statutory grants to the States are unenforceable in suits by private parties; the decision turned in part on the Court's conclusion that the particular grant there at issue committed expenditures largely to the State's discretion, as evidenced by the directive to use the funds for reclamation "as far as necessary." See *Hagar* v. *Reclamation Dist. No. 108*, 111 U.S. 701, 713 (1884). Here, in contrast to *Mills County*, the "lease" requirement in Section 6(i) is not discretionary, and the grant of 103,000,000 acres to Alaska pursuant to the Statehood Act did create a relationship in the nature of a trust. In addition, the state courts in this case have so far awarded only declaratory relief; they have not yet actually "enforced" Section 6(i) by granting injunctive relief. Finally, *Mills County* arose prior to Congress's express recognition of private suits to "enforce" restrictions on federal grants to the States when it enacted the Arizona-New Mexico Enabling Act in 1910.

a. Use of the term "lease" in Section 6(i) itself suggests a requirement that the State realize at least some revenue, because "[t]he legal understanding of a lease for years is, a contract for the possession and profits of land for a determinate period, with the recompense of rent." *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 526, 538 (1840). This interpretation of Section 6(i) is reinforced by the various factors identified by the Alaska Supreme Court: (1) the legislative history demonstrating that Section 6(i) was intended to assure financial support for the State (Pet. App. B51-B67); (2) the parallel drawn in the legislative history between the "lease" requirement in Section 6(i) and the Mineral Lands Leasing Act of 1920, which requires payment of both rentals and royalties (Pet. App. B64-B65 & n.27)[19]; (3) the patterning of Section 6(i) after the 1927 School Lands Act, which expressly contemplates that the States will realize "proceeds and rents and royalties" from the leasing of mineral lands (43 U.S.C. 870(b); see Pet. App. B29-B30, B39-B43, B63-B64); and (4) the fact that Section 6(i) was intended to put Alaska on a par with other western States, which uniformly require the payment of rents and/or royalties (see Pet. App. B63 n.25, B65-B66, quoting 3 *American Law of Mining* § 63.05[4][d] (Rocky Mtn. Min. L. Inst. 2d ed. 1987)).[20]

b. In addition, the history of the State's hard-rock mining laws (see pages 2-7, *supra*) demonstrates that they were not enacted with a view toward complying with the basic requirements of the "lease" provision in Section 6(i). Congress deliberately declined to authorize mining under a mineral location system, as petitioner AMA and many delegates to the Alaska Constitutional Convention had urged. See pages 4-6, *supra;* Pet. App. B34-B36 & n.16, B39-B54. Nonetheless, the Alaska Legislature enacted the State's hard-rock mining laws in 1959 as a mineral location system, not a mineral leasing system.

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[19] See also *1957 Hearings*, *supra* note 2, at 222-223 (witness for petitioner AMA acknowledges that under the "mandatory leasing" provisions of Section 6(i), a lease "would be probably on a royalty basis").

[20] See, *e.g.*, Ariz. Rev. Stat. Ann. § 27-234 (Supp. 1987); Colo. Rev. Stat. § 36-1-113 (Supp. 1987); Idaho Code § 47-704 (Supp. 1987); Mont. Code Ann. §§ 77-3-115, 77-3-116 (1988); Nev. Rev. Stat. § 322.030 (1985); N.M. Stat. Ann. §§ 19-8-21, 19-8-22 (1985); Utah Code Ann. § 65-1-18 (1986).

And the Legislature followed that course not on the premise that a location scheme complied with Section 6(i), but on the premise that the "lease" requirement in Section 6(i) was inapplicable, except in those limited instances in which selected lands were subsequently sold (for which the Legislature authorized a special leasing scheme) See pages 6-7, *supra*.

The Attorney General of Alaska concluded in 1981 that the State's original interpretation of the "lease" requirement in Section 6(i) was incorrect and that it applies to all mineral lands selected by the State. See page 7, *supra*. It is that Attorney General's opinion, not the decision of the Alaska Supreme Court in this case, that unsettled whatever expectations mining interests and others in Alaska might have had. Yet the State Legislature accepted that interpretation when it amended the State's hard-rock mining laws in 1981, and that interpretation is not at issue here. The 1981 amendments now do provide for mineral "leases" on all selected lands that were known to be mineral in character when they were selected by the State; but those amendments have never been invoked, because the State has never made the requisite formal finding that any particular tract was known to be mineral in character when it was selected. See pages 7-8, *supra*. Moreover, the Alaska Supreme Court concluded in this case that any leases issued under those provisions would be "in substance indistinguishable from state mining locations" (Pet. App. B70-B71 (footnote omitted)), because the right to lease is conditioned upon a mining location, because no royalties are charged for the extraction of minerals, and because the annual rent is set at the amount of labor required to maintain a mining location for the same claim (*id.* at B68-B70). Thus, the holding below rests in large part on the Alaska Supreme Court's determination that the State Legislature intended to and did enact what is fundamentally a mineral location system for hard-rock minerals—the very approach Congress rejected when it enacted Section 6(i). We have no reason to disagree with this assessment by the Alaska Supreme Court of the Alaska Legislature's actions.

c. Petitioners rely on a statement in a 1955 memorandum prepared by a Mr. Slaughter of the Solicitor's Office in the Department of the Interior on the then-pending statehood bill

(see Pet. App. C1-C11), which stated that what is now Section 6(i) " 'does not attempt to prescribe maximum or minimum rates of royalty' " and that it " 'leave[s] the terms of leasing wholly to the discretion of the state legislature' " (87-206 Pet. 35-36, quoting Pet. App. C15). Based on this passage, the State argues (87-206 Pet. 36) that there are no restraints on the Alaska Legislature in fashioning laws governing the disposition of minerals (beyond the prohibition against issuing a patent for the minerals). The Alaska Supreme Court correctly rejected a broad reading of the Slaughter memorandum that would suggest that the State need not collect *any* rents or royalties—especially since the memorandum also states that " 'Alaska should not be accorded greater freedom in the administration of mineral lands than that accorded existing States having Congressional land grants' " (Pet. App. B69 n.29, quoting *id.* at C5; see also *id.* at C10): other States are governed by the 1927 School Lands Act, which expressly contemplates the receipt of proceeds and rents and royalties from mineral leasing. See page 25 and note 20, *supra.*[21] The Alaska Supreme Court also reasonably concluded that a mining claimant's performance of $200 worth of labor annually to maintain his mining claim does not satisfy the requirement under Section 6(i) that the State receive at least some rents or royalties from mineral leasing. As the Alaska Supreme Court observed, annual labor is required under mineral location laws "to ensure that the claim is worked so that the miner does not locate numerous claims and obtain the right to exclude others"; it "is not a source of revenue to the landowner" (Pet. App. B70, citing *Chambers* v. *Harrington,* 111 U.S. 350, 353 (1884)).

d. Neither the Alaska Supreme Court nor the Superior Court on remand prescribed a specific amount of rents or royalties that must be paid pursuant to a lease under Section 6(i). They properly left determination of the amount to the Alaska Legislature in the first instance, now that Alaska's Supreme Court has disabused its Legislature of the notion that Section 6(i) permits the State to retain a statutory scheme that

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[21] Moreover, under this interpretation, Alaska presumably would be free, as a matter of federal law, to dispense with the payment of rents and royalties for the extraction of oil and gas from the substantial reserves underlying lands granted to the State by the Statehood Act.

is, in substance, a mineral location system, rather than a true "lease" system. Resolution of any questions concerning the permissible contours of a true "lease" system under Section 6(i) should await future amendments by the Alaska Legislature.

4. There is considerable force to respondents' contention in their cross-petition (87-371 Cross-Pet. 9-20) that the Alaska Supreme Court erred in holding that Section 6(i) applies only to lands that were known to be mineral in character when they were selected by Alaska (Pet. App. B71-B84). Section 6(i) states that "[a]ll grants" made by the Act "shall include mineral deposits"; that the grants under Section 6(a) or (b) are made on the condition that all dispositions shall be subject to a reservation of mineral interests to the State; and that "[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct." There is no indication that this all-inclusive language was intended to apply only to those lands whose mineral character was known when they were selected. To the contrary, as respondents point out (87-371 Cross Pet. 16-17), a provision that would have required the mineral character of the land to be determined when the patent issued to the State was deleted by the House Committee. See Pet. App. B79-B82. Moreover, the underlying purpose of Section 6(i)—to furnish a substantial financial base for the State—suggests that its all-inclusive language means what it says.

Despite the reference in the first sentence of Section 6(i) to the inclusion of mineral deposits in "[a]ll grants," the Alaska Supreme Court held that deposits *unknown* at the time of selection were not covered by Section 6(i) and instead were included in the grants of land made by Section 6(a) or (b). The Court reasoned that lands that were not known to be mineral in character were included in the original grants of school sections to other States and that the purpose of the 1927 Act, on which Section 6(i) was based, was only to include known mineral lands in those grants. See Pet. App. B43-B45, B72-B76. In those other States, however, the exclusion from the 1927 Act of lands whose mineral character was not known at the time of statehood did not reflect a decision by Congress to exempt the mineral deposits in such lands from *all* restrictions on their use and disposition. Lands whose mineral character was unknown at the time of statehood were not covered by the 1927 Act because

they were *already* part of the original grant of school lands made by the relevant statehood Act itself (cf. *United States* v. *Wyoming*, 255 U.S. 489, 500-501 (1921); *United States* v. *Sweet*, 245 U.S. 563, 572-573 (1918)); for this reason, any mineral deposits that were later discovered in such lands while they remained in state ownership presumably were *already* subject to the requirements in the relevant statehood Act that the lands be held in trust and be disposed of for school purposes. By contrast, the Alaska Supreme Court's decision limiting the reach of Section 6(i) appears to have the effect of excluding mineral deposits in lands whose mineral character was not known at the time of selection from *all* restrictions, and of allowing the States to give away the hard-rock minerals in such lands—unless Section 6(a) or (b) of the Statehood Act also imposes a trust obligation on the State to exact some rental or royalty payments for the extraction of minerals from lands selected by the State pursuant to those provisions.

Of course, even if the application of Section 6(i) does not turn solely on knowledge concerning the mineral character of particular land at the time it was selected (or the patent was issued (see Pet. App. B84 n.33)), the State might be free to classify land definitively as either mineral or non-mineral at a later date, such as immediately prior to a proposed sale or lease. But it does not necessarily follow that Section 6(i) should be construed to exclude lands in which mineral deposits are discovered by a mining claimant prior to such a formal classification and prior to any sale, lease or other disposition by the State, simply because those deposits were not identified at the time the lands were selected by or patented to the State, perhaps many decades earlier.

We do not propose here a definitive view of the proper interpretation of Section 6(i) in this regard. Respondents have filed their cross-petition on a conditional basis, urging that it be granted only if the Court grants the principal petitions filed by the State and the Alaska Miners Association. See 87-371 Cross Pet. 9-10; Trustees Br. in Opp. 10 n.3. Because we believe that the principal petitions should be denied, we submit that the cross-petition should be denied as well (see this Court's Rule 20.5). That course would permit the Alaska Legislature to address the issues raised by the cross-petition when it considers

whatever amendments to the State's mining laws it believes are required by the Alaska Supreme Court's decision on the other issues in the case.

CONCLUSION

The petitions and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

APPENDIX

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

Case Civ. No. 3AN-83-9862

TRUSTEES FOR ALASKA; NUNAM KITLUTSISTI; DINYEA CORPORATION; VILLAGE OF MINTO; ALASKA INDEPENDENT FISHERMEN'S MARKETING ASSOCIATION; ALASKA CENTER FOR THE ENVIRONMENT; SOUTHEAST ALASKA CONSERVATION COUNCIL; FRIENDS OF THE EARTH, PLAINTIFFS

vs.

STATE OF ALASKA; ALASKA DEPARTMENT OF NATURAL RESOURCES, ESTHER WUNNICKE, COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES, DEFENDANTS

ALASKA MINERS ASSOCIATION, FAIRBANKS NORTH STAR BOROUGH, JOSEPH VOGLER, DEFENDANTS–INTERVENORS

ORDER

1. *Procedural Background*

The issues presented in this action were originally addressed by this Court through rulings on cross-motions for summary judgment. Such rulings were then appealed to the Alaska Supreme Court, which reversed this court's rulings, and held that the parties had standing to litigate the issues herein, that the state's mineral leasing system violated Section 6(i) of the Statehood Act insofar as it did not require miners to pay "rents or royalties" on mining leases, and that the Section 6(i) restrictions applied only to those lands known to have been mineral in character at the time the lands were selected by the state. *Trustees for Alaska v. State,* 736 P.2d 324 (Alaska 1987). The Alaska Supreme Court then remanded this action to this Court with the express direction to "enter a declaration in

accordance with [its] opinion and for such other and further proceedings as may be appropriate." *Id.* at 342.

Pursuant to such remand, and on May 24, 1987, this Court ordered plaintiffs Trustees for Alaska to submit a proposed order and declaratory judgment form consistent with the Alaska Supreme Court's aforementioned decision. Plaintiffs submitted such proposed order on July 10, 1987, and thereafter, defendant State and defendant-intervenors Alaska Miners Association opposed the order, objecting to specific portions thereof.

Meanwhile, defendant State and defendant-intervenor sought further appellate review of the Alaska Supreme Court's decision by filing petitions for writs of certiorari with the United States Supreme Court. Plaintiff Trustees subsequently filed a cross-petition for a writ of certiorari. The parties' various petitions are still pending at this time.

Given the pending petitions before the United States Supreme Court, defendant and defendant-intervenor filed a Motion to Suspend Proceedings with this Court on September 11, 1987, essentially seeking a stay of further proceedings before this Court until such time as the United States Supreme Court acted upon the pending petitions.

Arguments on plaintiffs' proposed declaratory judgment form and order, and defendants' Motion to Suspend Proceedings were heard by this Court on October 28, 1987. In the instant order, the Court rules on the parties' objections, arguments and motion as set forth below.

2. ***Defendants' Motion to Suspend Proceedings.***

Defendants' motion is denied.

This court interprets the Alaska Supreme Court's instructions on remand to be a direct order from the appellate court to the lower court to take certain action. Thus construed, this Court concludes that it has no discretion to refrain from following the appellate court's direction, and that it is obliged to attempt to implement, in good faith, the order of the higher court. Accordingly, this Court has held "such other and further proceedings" on plaintiffs' proposed order and declaratory judgment form,

and defendants' objections thereto, and has issued a declaratory judgment which the Court believes to be consistent with the Alaska Supreme Courts' decision in this case. In this Court's view, any request by any party to stay or "suspend" the implementation of the Alaska Supreme Court's decision, pending action by the United States Supreme Court on the parties' petitions for writs of certiorari, should be addressed to the Alaska Supreme Court.

3. ***Proposed Declaratory Judgment Form and Injunction.***

The Court has issued a revised version of plaintiffs' proposed declaratory judgment form. The parties' objections, and the Court's revisions, are addressed separately below.

a. "*Rents or Royalties*"

Plaintiffs' proposed declaratory judgment contains the language "rents *and* royalties." Plaintiffs argue such language reflects the essence of the Alaska Supreme Court's holding, and that the Court intended that the State is not free to adopt one form of compensation to the exclusion of the other. Defendants contend that the Alaska Supreme Court used the language "rents *or* royalties" with precision in its appellate decision, and that the Court is, in effect, giving defendant State the discretion to fashion whatever compensation system it deems appropriate.

This Court agrees with defendants' interpretation of the Alaska Supreme Court's decision. In its opinion, the Alaska Supreme Court discusses "the leasing systems of other states", noting that they differ from the federal leasing system but that they are "uniform in requiring the payment of rent, *or* royalties, *or* both." *Id.* at 338. (Emphasis added). The Supreme Court went on to acknowledge and discuss that such state leasing systems can be categorized into two types: one which requires the payment of both rents and royalities, but which credits the former against the latter or which ceases rent payments when the payment of royalties begins; and the second which separately requires the payment of *both* rents and royalties, independent of one another. *Id.* In construing Section 6(i) of the Statehood Act, the Court considered such differing mineral leasing systems

of other states and concluded that Section 6(i) "mandates a system under which the states must receive rent *or* royalties for its mineral leases." *Id.* (Emphasis added). This Court concludes that, in using such language, the Alaska Supreme Court intended to give the State the flexibility to fashion whichever leasing system it chose—whether allowing the crediting of rents against royalties or requiring the payment of both rents and royalties. The only thing which the State is *not* free to do, however, is to adopt a system which charges *no* rents or royalties for the extraction of minerals from state mineral lands. *Id.* at 338 n. 29.

In this Court's view, the Alaska Supreme Court carefully chose, and intended to use, the precise language "rents or royalties." Accordingly, this Court has used such language in the declaratory judgment issued herewith.

b. "*Fair Market Value*"

Plaintiffs' proposed declaratory judgment form suggests, and defendants object thereto, that the leasing system adopted by defendant State must charge rents or royalties reflective of the "fair market value of the hardrock mineral resources" of the State.

As noted above, this Court interprets the Alaska Supreme Court's decision in this case as recognizing that the State has substantial flexibility and discretion in fashioning some appropriate leasing system requiring the payment of "rents or royalties" for the extraction of minerals. The Alaska Supreme Court did not mandate that a particular valuation approach must be used by the State in setting such "rents or royalties." Rather, the only requirement imposed upon the State, by the Alaska Supreme Court as this Court interprets the appellate decision, was that the State has to charge *some* rents or royalties for extracted minerals, i.e., that the State was not free to impose *no* such charges on miners extracting minerals from state mineral lands. Accordingly, this Court has declined to incorporate any particular valuation standard or requirement, such as the proposed "fair market value" requirement of plaintiffs' proposed order, into its declaratory judgment.

c. *Determination of Mineral Character of State Lands*

Defendants object to that portion of plaintiffs' proposed declaratory judgment form which refers to "all state lands" as well as "hardrock" mineral resources.

As this Court interprets the Alaska Supreme Court's decision, the appellate court specifically considered, and rejected, the argument that the leasing system should apply to "all lands" where mineral are found. *Id.* at 341. Rather, the Supreme Court concluded that the restrictions of Section 6(i) "were intended to apply only to lands whose mineral character was known at the time of selection." *Id.* Further, the Court characterized such mineral resources as "mineral deposits." *Id.* at 339. Finally, the Court acknowledged that the "all lands" test might avoid "administrative problems" in determining the mineral character of land at the time of selection, but nevertheless rejected such test in its final holding on this issue.

This Court, therefore, has substituted the terms "lands whose mineral character was known at the time of selection" for "all state lands", and "mineral deposits" for "hardrock mineral resources" in plaintiffs' proposed judgment form. Similarly, the Court has declined to specify any particular methodology or process for the identification of such lands, or any definition of "mineral deposits', but instead defers to the State and/or the legislature in this respect.

d. *Injunction*

Plaintiffs' proposed declaratory judgment and order contain a prospective injunction, which would enjoin the State from allowing the extraction of mineral deposits from appropriate state lands after May 15, 1988, *if* a leasing system conforming to the Supreme Court's interpretation of Section 6(i) has not been adopted or enacted. Defendants contend that no injunction should issue since no imminent harm is about to occur. Defendants argue that mining activity realistically is not conducted during the winter months, that the issuance of an injunction would be premature at this point, and that the Alaska Legislature

should be given an opportunity to enact an appropriate leasing system during the next legislative session.

The Court agrees with defendants that the issuance of any injunction at this time would be premature and inappropriate. The Court thus declines to issue any injunctive relief in connection with the instant declaratory judgment. Should the State and/or Legislature fail to adopt an appropriate leasing system by the time the next mining season is about to commence, any party is free to return to this Court with a proper application for injunctive relief at such time.

4. *Attorneys' Fees.*

Insofar as this litigation is a "public interest litigation", and plaintiffs are "public interest litigants", the Court will allow an award of full, reasonable attorneys' fees and costs to plaintiffs regarding this litigation. Plaintiffs shall submit their application for fees and costs, along with detailed supporting documentation, pursuant to Rules 82 and 79. All parties will have an opportunity to brief such isues in accordance with applicable Civil Rules.

Dated this 9 day of November, 1987.

/s/ DOUGLAS J. SERDAHELY
Douglas J. Serdahely

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

Case Civ. No. 3AN-83-9862

TRUSTEES FOR ALASKA; NUNAM KITLUTSISTI; DINYEA CORPORATION; VILLAGE OF MINTO; ALASKA INDEPENDENT FISHERMAN'S MARKETING ASSOCIATION; ALASKA CENTER FOR THE ENVIRONMENT; SOUTHEAST ALASKA CONSERVATION COUNCIL; FRIENDS OF THE EARTH, PLAINTIFFS

vs.

STATE OF ALASKA; ALASKA DEPARTMENT OF NATURAL RESOURCES, ESTHER WUNNICKE, COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES, DEFENDANTS

ALASKA MINERS ASSOCIATION, FAIRBANKS NORTH STAR BOROUGH, JOSEPH VOGLER, DEFENDANTS–INTERVENORS

DECLARATORY JUDGMENT

Pursuant to the remand in this action by the Alaska Supreme Court in *Trustees for Alaska v. State,* 736 P.2d 329 (Alaska 1987), this Court has considered the Supreme Court's decision, plaintiffs' proposed declaratory judgment order and defendants' and defendant-intervenors' responses thereto. The Court finds and declares as follows:

1. The State of Alaska's current system allowing the extraction of mineral deposits from state lands, AS 38.05.185 *et seq.*, violates Section 6(i) of the Alaska Statehood Act because it does not require the payment of rents or royalties from state lands whose mineral character was known at the time of state selection.

2. To comply with Section 6(i) of the Alaska Statehood Act, the State's mineral leasing system must include some process for determining which lands were of known mineral character at the time of selection and must further require the payment of rents

or royalties for the extraction of mineral deposits from such lands.

3. Plaintiffs, as successful public interest litigants in this action, are entitled to their full, reasonable attorneys' fees and costs incurred during the litigation of this case. Plaintiffs shall file a proper application for attorneys' fees and costs along with detailed documentation therefor, pursuant to Civil Rules 82 and 79.

DATED this 9th day of November, 1987.

/s/ DOUGLAS J. SERDAHELY
Douglas J. Serdahely
Superior Court Judge

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Nos. 87-205, 87-206 and 87-371

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALASKA MINERS ASSOCIATION, PETITIONER

v.

TRUSTEES FOR ALASKA, ET AL.

STATE OF ALASKA, PETITIONER

v.

TRUSTEES FOR ALASKA, ET AL.

TRUSTEES FOR ALASKA, ET AL.,
CROSS-PETITIONERS

v.

STATE OF ALASKA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALASKA

SUPPLEMENTAL BRIEF FOR ALASKA MINERS ASSOCIATION IN RESPONSE TO THE VIEWS OF THE SOLICITOR GENERAL

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By way of this Supplemental Brief the Alaska Miners Association, Petitioner in No. 87-205, submits its response to the Brief submitted by the Solicitor General for the United States as Amicus Curiae. The Solicitor General asserts the following:

1. This Court does not have jurisdiction to entertain the petitions or cross-petition for writ of certiorari because respondents do not satisfy the standing requirement of Article III of the U.S. Constitution.

2. The Supreme Court of Alaska correctly held that Section 6(i) of the Alaska Statehood Act does not preclude Alaska courts from entertaining a private action seeking declaratory judgment on the validity of the State's mining laws.

3. The Alaska Supreme Court was correct in holding that:

a. the State's mining law is not a leasing system;

b. the "lease" provision in Section 6(i) requires the payment of at least some rents or royalties for the extraction of minerals; and

c. the State's mining laws fail to require such payment.

4. The Alaska Supreme Court erred in limiting the lease requirement in Section 6(i) to lands that were known to be mineral in character when they were selected by the State.

The following discussion analyzes each assertion.

I

The existence of a question about whether this Court has jurisdiction to entertain the petitions or cross-petition for certiorari itself provides a further reason why this Court should grant certiorari.

The Alaska Miners Association agrees with the Solicitor General and the State

of Alaska that respondent private parties have no more than generalized grievances about the conduct of government and, therefore, would have no Article III standing to bring this case in federal court. S. G. 14-15, and State of Alaska Supplemental Brief 17. The Alaska Supreme Court, however, found that the respondents' status as citizens[1] gives respondents a sufficient derivative interest or stake in the performance of state governmental functions that they have standing in state court.

The Solicitor General asserts that, although state courts are not barred by the federal constitution from employing such a theory of standing, this Court has consistently held that, when standing is

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[1]In his argument the Solicitor General erroneously assumes that respondents are state taxpayers. Alaskans do not pay personal income taxes to the State.

based on nothing more than an interest in the conduct of government, an individual does not meet the standing requirements of Article III. S. G. at 14. The Solicitor General thus concludes that the Court should deny the petition for certiorari.

In so arguing, the Solicitor General elides the issue that makes this case worthy of certiorari. This Court has not yet decided whether, when a state court invalidates a state law based upon the application of a federal law, the state court plaintiff's lack of Article III "injury-in-fact" will bar the nonprevailing party (typically, the state government) from seeking review in the United States Supreme Court.[2] If the

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[2]See, Laurence H. Tribe, American Constitutional Law, 113-114 and n. 20 (2d Ed. 1988); P. Bator, et al., Hart and Wechsler's, The Federal Courts and the Federal System, 161, 181 (2d Ed. 1973), and Barnes v. Kline, 759 F.2d 21, 63 n. 16 (D.C. Cir. 1985) (Bork, J. dissenting), (continued)

Court fails to resolve this issue, it consigns a spectrum of important cases to a limbo in which reviewability by this Court will remain uncertain. Thus, the question of whether this Court has jurisdiction to hear this case does not provide a ground for denial of the petition for certiorari, but instead reinforces the petitions by providing an additional and independent reason for granting review.

II

Whether Section 6(i) precludes a private action filed in state court to determine the validity of the state's mining laws is an issue worthy of review by this Court.

Although the Solicitor General agrees that a private cause of action would not be properly implied in federal court to enforce Section 6(i), S. G. 17-18, he nonetheless concludes that a state court

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judgment vacated sub nom., Burk v. Barnes, 479 U.S. 361 (1987).

is free to imply such a cause of action. These petitions for certiorari raise precisely that issue: whether a state court can imply a private cause of action under federal law when a federal court would not similarly imply a private right of action. It is an issue of first impression for this Court, and for that reason, the petition for certiorari should be granted.

The Solicitor General, however, asserts that this case should be construed as a state cause of action for relief by citizens of Alaska "injured" by the State's violation of federal law. S. G. 18. The Solicitor General suggests that it is not unusual for a state court to construe federal law when it is an element of a state-created cause of action. In this case, however, the Alaska Supreme Court stated in unequivocal terms

that it was ruling directly upon federal law:

> Appellants' state constitutional and public trust theories depend on the meaning of the grant and restrictions of Section 6(i). Since Section 6(i) directly controls, we have no occasion to examine these theories further.

86-206 Petitioner's Appendix B85 ("Pet. App."). Unlike the cases cited by the Solicitor General, S. G. 19-20, this case involves no state cause of action independent of that federal statute. Rather, the Alaska Supreme Court has given private parties a "direct" statutory enforcement action in state court. Thus, this Court is squarely faced with the issue of whether a state court can imply a private cause of action under federal law when a federal court would not similarly imply a private right of action.

Under the theory that the claims asserted in this case are state claims, the Solicitor General raises three

principal reasons why the Alaska Supreme Court's holding that a private right of action exists under Section 6(i) is correct on the merits.[3] The three reasons are preemption, res judicata and lack of federal resources to monitor Section 6(i). As discussed above, the Alaska Miners Association asserts that the Solicitor General has mischaracterized the claims asserted by the plaintiffs as causes of action under state law only. Nonetheless, for purposes of rebuttal the Alaska Miners Association discusses briefly each of the three arguments on the merits. The Solicitor General asserts

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[3]The three reasons raised by the Solicitor General do not address the "certworthiness" of this case, but rather are directed at the merits. The Solicitor General's repeated discussion of the merits, rather than the certworthiness of the case, is further support that the issues raised by this case are of sufficient importance to warrant review by this Court.

that preemption is the "relevant issue." S. G. 20. His preemption analysis is erroneous. The Solicitor General's concession that no implied private right of action under Section 6(i) exists in federal court should be dispositive: federal legislation which excludes private enforcement in federal court surely must preempt any private enforcement in state court.[4] As the Solicitor of the United States Department of the Interior points out, "[i]n essence, the government's current exercise of prosecutorial discussion will have been preempted by the Alaska Supreme Court without any

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[4]In Davis v. Passman, 442 U.S. 228, 239 (1979), this Court stated, "[i]t is entirely appropriate for Congress in creating . . . rights and obligations, to determine . . . who may enforce them and in what manner." Id. at 241. Section 6(i) makes a "textually demonstrable commitment," Id. at 242, of enforcement authority and that commitment is solely to the United States Attorney General in federal court.

participation of the United States." State of Alaska, Supplemental Brief Appendix 13 ("App."). The language of Section 6(i) makes it clear that Congress intended to "occupy the field" with regard to enforcement of Section 6(i). A private enforcement action in state court interferes with that scheme. See, International Paper Company v. Ouellette, ___ U.S. ___, 107 S. Ct. 805, 811-814 (1987).

The Solicitor General also takes the view that a state court decision would have no res judicata effect upon federal courts considering a forfeiture action brought by the Attorney General. S. G. 16-17. That view will engender serious confusion in the interpretation of the federal statute and the stewardship of federal land interests retained by the United States under that statute. The Alaska Superior Court and the Solicitor of

the Department of the Interior have already concluded that the state laws comply with the Section 6(i) leasing condition (Pet. App. A9-A12; App. 5-10), while the Alaska Supreme Court and the Solicitor General have concluded otherwise. Pet. App. B51-B71; S. G. 24-84. The Solicitor General's views can hardly be taken as an authoritative pronouncement of the federal government, especially in light of his recognition that the Alaska Supreme Court's decision is "purely advisory." Such confusion leaves federal agencies and the Alaska state executive and legislative branches in an untenable position.

Finally, the Solicitor General asserts that,

> [t]he Attorney General does not have the resources to monitor the administration and deposition of millions of acres of land that were granted the State. Suits by private parties and beneficiaries of the trust can furnish the

> important means for ensuring that the limitations imposed by Congress are respected.

S. G. 23. The Alaska Miners Association concurs with the State of Alaska that these assertions should be rejected for a variety of reasons. First, the decision to imply a private cause of action is always based on a claim that it would benefit overall enforcement. That has not prevented this Court from ruling in many cases that Congressional enactments do not permit private enforcement. Second, the absence of a forfeiture suit is not due to any lack of federal resources, but rather to the judgment by the Interior Department that there was in fact no violation of the leasing condition. See, Solicitor Tarr's Opinion, App. 5-10. Third, Section 6(i) contains no trust language that in any way restricts the State's use of mineral revenues from lands received under the

Section 6 land grants. See, State of Alaska Supplemental Brief 13-14.

III and IV

Although the Solicitor General's interpretation of Section 6(i) is wrong on the merits, his raising of the arguments underscores the importance of this case and its need for review.

The Solicitor General makes several additional arguments directed at the merits of the Alaska Supreme Court's interpretation of Section 6(i). S. G. 24-30. These arguments need not be addressed in determining whether to grant the petitions for certiorari, but they do suggest the importance of the issues and the need for a conclusive determination of the issue by this Court. The Alaska Miners Association does not address the merits in this supplemental brief, except to note (1) that the Solicitor General incorrectly construes the language of Section 6(i) of the Alaska Statehood Act, see State of Alaska Supplemental Brief 2,

and (2) the issues decided by the Alaska Supreme Court are sufficiently important that they provide an independent reason for review of the case. See, Alaska Miners Association petition for certiorari at 12-13.

Conclusion

The petitions for a writ of certiorari should be granted.

Respectfully submitted this 24th day of May, 1988.

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